ARTICLES

VIRTUOUS CAPTURE

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A regulatory agency is captured if, instead of the public interest, it pursues the interests of powerful firms it is intended to regulate. Scholars disagree about which agencies are captured, how they become captured, and what reforms, if any, can prevent capture. There is consensus on one issue: capture is a vice.

In this Article, I argue that capture can be a virtue. When powerful interest groups thwart justified regulation, the optimal strategy for pursuing that regulation may be to indirectly empower interest groups that stand to profit from it in the long-run. Legislation creating new interest groups—or altering the incentives of existing ones—can develop a political economy that will support public-interested regulation. Currently dominant interest groups may not be able to anticipate and suppress this long-term threat to their power.

This Article describes how legislation that changed the dynamics of interest group power has led to regulation—on climate change, air bags, and toxic waste—that had been previously blocked by powerful industries. It offers a novel theoretical account of why dominant interest groups predictably fail to stop legislation that empowers rival interest groups over time. It suggests reforms to administrative, tort, and insurance law that can be expected to lead to desirable, but currently unachievable, regulation. It defends virtuous capture as an empirically realistic and normatively permissible means to achieve those ends.

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INTRODUCTION

How should public-interest regulation be pursued when powerful private interest groups oppose it? I contend that, in some cases, the best strategy is to fight fire with fire.[1]

1. For most of this Article, I use "public-interested regulation" as shorthand for regulation that is welfare-enhancing. I briefly entertain the view that regulation should pursue prioritarian rather than welfarist ends in Part VI.A. I recognize that welfare-enhancing regulation may confer disproportionate benefits on certain private interests—

According to public choice theory, interest group influence pervades legislation and regulation.[2] Legislators seek reelection, and interest groups can provide votes and the means to acquire more votes—campaign contributions and expenditures.[3] But not all interest groups are equal. The strongest interest groups are concentrated, wealthy repeat players. Smaller groups have organizational advantages.[4] As each of their members has a large per capita stake in the group's shared interest, these groups are better equipped to solve collective action problems.[5] Wealthy interest groups can afford more influence. Repeat player interest groups acquire strategic knowledge and relationships and can take short-term losses for long-term gains.[6]

The most important of the concentrated, wealthy repeat player interest groups are associations of business firms.[7] Firms use their influence in the legislative and regulatory process for profit. They will seek regulations that will generate rents.[8] They can "capture" a regulatory agency by reorienting the agency to serve the firms' interests rather than the interests the agency's statute purports to protect.[9]

Scholars have differed on how democracies should respond to the problem of interest group influence in legislation and regulation. Some come close to arguing that all legislation is socially wasteful and rent-seeking, and that we should abandon hope of regulation in the public interest.[10] Others claim that interest group influence is greatly exaggerated

indeed, the Article's thesis depends on the existence of cases in which the disproportionate private interests of some groups and the public interest are aligned.

2. *See, e.g.*, DENNIS C. MUELLER, PUBLIC CHOICE III 472–500 (2003) (describing theoretical models and empirical evidence on interest group activity).

3. *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 12 (1971).

4. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

5. *See id.* at 44.

6. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 98–101 (1974).

7. *See generally* Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. POL. 564 (2014) (providing empirical evidence on the substantial influence of business interest groups).

8. *See, e.g.*, MUELLER, *supra* note 2, at 333–58.

9. *See, e.g.*, Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 341–42 (1974) [hereinafter Posner, *Theories*] (describing theories of capture). Posner distinguishes between various "capture" theories, including one he attributes to political scientists and another to economists. *See id.* at 341, 343.

10. *See, e.g.*, Richard A. Epstein, *Toward A Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 713–14 (1984) ("Any grant of legislative power will invite 'rent-seeking' behavior; each group will try to use that legislative power to expropriate the wealth of its rivals. . . .The recent growth of the interest-group theory of legislation provides powerful

and that taking public choice theory seriously might become a self-fulfilling prophecy.[11] Many propose that we should adopt procedural reforms to reduce the opportunity for interest group influence, calling for judicial intervention.[12]

None of these answers are fully satisfactory. There are many regulations for which the best causal explanation is the rent-seeking behavior of firms and for which a plausible, public-interested normative defense cannot be offered.[13] But there are even more examples of regulations that do impose costs on the concentrated, wealthy repeat player interest groups and generate benefits to a diffuse public.[14] Therefore, neither abandoning hope of public-interested regulation nor ignoring the problem of interest group influence is justified.

Procedural reforms have proven less fruitful than initially anticipated. Part of the problem is political. Proposed reforms to decrease interest group influence face the same challenge the reforms attempt to alleviate—opposition from powerful interest groups.[15] By definition, these reforms would benefit a diffuse public, but would diminish the value of interest

evidence of the persistence and extent of legislative abuse."). But nothing in public choice's positive account of legislation and regulation supports a deregulatory agenda. *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 50 (1998) [hereinafter Croley, *Process*] ("The theory's deregulatory policy reforms do not follow even from within its own framework. They come, rather, as something of a non sequitur.").

11. *See, e.g.*, Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988). I am sympathetic to much of Kelman's criticisms, but I am more optimistic than he is that the positive insights of public choice theory can be disentangled from its early theorist's normative commitments.

12. For proposals to use judicial review to solve public choice problems, see, for example, RICHARD A. EPSTEIN, TAKINGS (1985); Erwin Chemerinsky, *The Supreme Court 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985). For proposals to use statutory interpretation instead, see, for example, William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); Jonathan R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989). For a more exhaustive list of both, see Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991).

13. For some empirical examples, see, for example, MUELLER, *supra* note 2, at 343–55.

14. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 32–33 (1991).

15. *See, e.g.*, Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 355 (claiming that the "the judicial process is more susceptible to manipulation by narrow interests than are the more democratic branches of government"); Elhauge, *supra* note 12, at 66–87 (arguing that the litigation process is also subject to public choice problems).

groups with expertise in how the current system works. Part of the problem is conceptual. Despite many attempts, it has proven surprisingly difficult to articulate a theory of when interest group influence justifies judicial action independent of any normative assessment of the policy adopted.[16]

I offer a new answer. I argue that, under certain circumstances, rent-seeking is not socially wasteful, and capture is not a vice.[17] In some cases, political actors can and should use interest groups—by altering their power and incentives—to pursue public-interested regulatory goals.

Consider the case of a carbon tax.[18] It is a textbook example of a regulation that interest group influence would obstruct. A carbon tax would impose costs on the fossil fuel industry—a concentrated, wealthy, repeat player interest group. It would confer benefits on a diffuse public or, more realistically, on future generations. Attempts to enact a carbon tax directly, at least given the prevailing political economy in the United States in 2015, would fail.

But there might be an indirect strategy: increase the influence of interest groups who will stand to profit from a carbon tax. We can do this through subsidizing clean energy firms and watching them grow into more powerful, influential interest groups. If the strategy works, the clean energy firms—for purely profit-motivated reasons—will lobby for a carbon tax and ultimately achieve indirectly what was not feasible directly. The clean energy firms' behavior in this example is undoubtedly "rent-seeking." Their aim would be to partially capture the legislature or regulatory agency for their purposes, but the outcome would be socially valuable, and the means may be justified.

This hypothetical immediately raises a conceptual issue. If the fossil fuel

16. *See* Elhauge, *supra* note 12, at 48–66 (maintaining that there is no plausible basis for invalidating a law on public choice grounds that is independent of one's normative position on the outcome). A potential third problem is doctrinal. The Supreme Court has even strained to avoid striking down legislation that was obviously the product of interest group influence and lacked a plausible public-interest rationale. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) (rejecting due process and equal protection challenges to a state statute designed to protect the interests of optometrists).

17. Others have argued that "rent-seeking" behavior may not always be socially wasteful. *See, e.g.*, FARBER & FRICKEY, *supra* note 14, at 34–35. For example, some scholars have argued that rent-seeking can motivate legislators to provide public goods. *See* Cross, *supra* note 15, at 370; *see generally* Tyler Cowen et al., *Rent Seeking Can Promote the Provision of Public Goods*, 6 ECON. & POL. 131 (1994) (contending that rent-seeking can be politically useful under certain conditions).

18. For an analysis of the incentives of how interest groups can be used to achieve public-interested climate regulation, see generally Eric Biber, *Cultivating a Green Political Landscape: Lessons for Climate Change Policy from the Defeat of California's Proposition 23*, 66 VAND. L. REV. 399 (2013).

industry can thwart the carbon tax directly, why could it not thwart the indirect strategy? There are three previously underappreciated reasons why indirect, long-term strategies might ultimately achieve public-interested regulation that currently powerful interest groups oppose. First, the incentives of managers, shareholders, and lobbyists might be too myopic to induce firms to halt incipient long-term threats. Second, in a federal system, interest groups that hold power at the national level might not have equal influence in state or local legislatures. This creates an opportunity for interest groups that are weaker at the national level to obtain favorable legislation at subnational levels and build up a power base. Third, because of fiscal politics and loss aversion, there is an asymmetry between the influence necessary to obtain a subsidy and the influence necessary to obtain a tax or restrictive regulation. Interest groups that can obstruct taxes directed at them might not be able to obstruct subsidies that would benefit their opponents.

Therefore, currently powerful interest groups may fail to thwart changes in interest group power and incentives that will lead indirectly to regulation that the groups have been able to block directly. If and when that is true, capture may not only be virtuous—it may also be part of the best strategy to achieve normatively desirable regulation.

This Article explains how virtuous capture could work in practice, using the regulation of health, safety, and environmental risks as a case study. Risk regulation is notoriously susceptible to interest group influence. It confers benefits on large, diffuse groups like consumers, workers, and the public as a whole. It imposes costs on commercial interests within certain industries—concentrated, wealthy, repeat-player interest groups. Risk regulation can be ideologically contentious, but genuine differences in values do not exhaustively explain the suboptimal state of existing regulation. Part of the explanation is interest group power.

Another reason why risk regulation is suited to the long-term, indirect virtuous capture strategy is that there are interest groups that have—or have the potential to have—incentives to support public-interested regulation for profit-seeking reasons. Within a risk-creating industry, there are firms that produce goods or provide services in a way that creates less risk than their competitors do, while other firms market products or services to reduce risks. These differentially risk-creating firms and risk-mitigating firms may stand to gain from stricter risk regulation. Outside of a regulated industry, there are other commercial interests with pro-regulatory incentives. For example, insurers have an incentive to reduce risks to their insureds so that the insurers pay out fewer or less costly claims. Lawyers have an incentive to sustain liability that will generate business. Employing virtuous capture requires an understanding of these interest groups—their power dynamics, their incentives, and how legislation and regulation can change them.

The Article proceeds in six Parts. Part I describes and critically evaluates public choice theory's account of interest group influence over legislation and regulation. Part II considers how interest group power changes over time and explains why currently powerful interest groups will not always be able to anticipate or thwart long-term threats to their power. Parts III–V analyze interest groups with potentially pro-regulatory incentives—industry, insurers, and lawyers—with the aim of generating specific suggestions for how they should be empowered and how their incentives should be altered. Part VI offers a normative defense of the strategy of virtuous capture, both its ends and its means.

I. INTEREST GROUP POWER OVER LEGISLATION AND REGULATION

Public choice theory provides a positive account of legislation and regulation.[19] It has been subject to exhaustive and powerful conceptual and empirical criticisms. The aim of this Part is to synthesize the insights of public choice theorists and their critics to arrive at a working conception of interest group influence over legislation and regulation that is empirically realistic.

A. Public Choice Theory

Public choice uses neoclassical microeconomic theory's rational actor model to generate its positive account of political actors and institutions.[20] According to the rational actor model, individuals aim to maximize their utility within the constraints they face.[21] Collective action will occur when it is in the interest of individual actors.[22] Institutions reflect the incentives

19. Throughout the Article, I use the phrases "public choice" and "public choice theory" to refer generally to research in economics, political science, and law that applies the rational actor model to analyze the behavior of political actors and the structure of political institutions. The main cost of this simplified approach is that I ignore the rich variety of differing public choice models. The main benefit is that I can offer suggestions about the best legal strategies to use public choice dynamics to advance public-interested regulation. A more comprehensive defense of any particular strategy would require a more sophisticated account of the relevant actors, institutions, and incentives.

20. *See* Posner, *Theories*, *supra* note 9, at 343.

21. For a basic introduction to the rational actor model as it is applied to law, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3–21 (6th ed. 2003) [hereinafter POSNER, ANALYSIS].

22. For an exhaustive list of the reasons why public choice predicts collective action will occur, see MUELLER, *supra* note 2, at 9–63.

of the individual actors.

The public choice theory of legislation starts with the assumption that legislators are motivated to maximize their chances of reelection.[23] If a legislator prioritizes some goals other than reelection, that legislator will be outcompeted in the next cycle by another candidate who more single-mindedly pursues election. To increase their chances of reelection, legislators seek votes and, because obtaining votes requires funding costly political campaigns, campaign contributions and expenditures.[24] Thus, they will be most responsive to the interest groups that can provide the most votes and campaign funds.[25] In exchange, legislators can offer their support for or opposition to legislation in which those groups have an interest.[26] Thus, "just as managers of firms are hired to further the interests of owners, so too are politicians and bureaucrats assumed to be hired to further the collective interests of pressure groups, who fire or repudiate them by elections and impeachment when they deviate excessively from these interests."[27]

Public choice theorists have posited similar accounts of the regulatory process, in which regulators are agents for their legislator principals.[28] In one model, through the mechanism of administrative procedures, "political actors stack the deck in favor of constituents who are the intended beneficiaries of the bargain struck by the coalition which created the agency."[29] Another model starts with a focus on the agents—regulators—and reasons that they seek to maximize their agency budgets.[30] On this model, legislators are able to partially control the behavior of regulators because they hold the purse strings.[31] These models converge on the following result: the same interest groups that have influence over

23. *See id.* at 475.

24. *See* Stigler, *supra* note 3, at 12.

25. *See id.* at 11–13.

26. *See id.* at 9–11.

27. Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 396 (1983). For a public choice account of legislation that assigns agency to legislators rather than interest groups, see generally FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION (1997).

28. *See generally* Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987). The co-authors of this article and a series of related articles are often known as "McNollgast." For a critique, see JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 118–23 (1997). For an alternative model, see Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53 (2008).

29. McCubbins et al., *supra* note 28, at 261 (emphasis omitted).

30. *See* MUELLER, *supra* note 2, at 362–68.

31. *See id.* at 367–68.

legislators will have influence over regulators.

Which interest groups will be able to provide the most votes and money to influence politicians? The fundamental, counterintuitive insight of public choice theory is that smaller, concentrated groups have systematic advantages over larger, diffused groups in solving the type of collective action problems that political influence necessitates.[32] In large groups, each individual member's per capita stake is small relative to the interest of the group as a whole, so each member has the incentive to free ride.[33] In smaller groups, however, each individual member has a greater per-capita stake and a lesser propensity to free ride.

Smaller groups have other predictable advantages in solving collective action problems. They can more easily monitor the contributions of individual members, making it more difficult for members to shirk their responsibilities.[34] With fewer members, it is also more likely that a small group will arrive at an agreement about how to pursue its aims.[35] Concentrated groups are more efficient at organizing because their small size reduces "the costs of communication among group members, the costs of any bargaining among them, and the costs of creating, staffing, and maintaining any formal group organization."[36] It is possible that, because individual members of small groups are more likely to interact with each other, small groups have better "social incentives" as well.[37]

These large, diffuse groups that are at a relative disadvantage can be consumers, workers, and the public as a whole.[38] Thus, "the laboring, professional, and agricultural interests of the country make up large, latent groups that can organize and act effectively only when their latent power is crystallized by some organization which can provide political power as a by-product" of other benefits like training, networking, or legal representation.[39] Conversely, "business interests generally can voluntarily and directly organize and act to further their common interests without any

32. *See* OLSON, *supra* note 4, at 43–44. For an extension of Olson's analysis explaining political organization as an extension of the theory of the firm, see Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 45–51 (1988).

33. *See* OLSON, *supra* note 4, at 44.

34. *See* Elhauge, *supra* note 12, at 38–39.

35. *See* OLSON, *supra* note 4, at 46; *see also* Posner, *Theories*, *supra* note 9, at 345.

36. OLSON, *supra* note 4, at 47; *see also* Posner, *Theories*, *supra* note 9, at 345.

37. *See* OLSON, *supra* note 4, at 62–63.

38. *See* Elhauge, *supra* note 12, at 40 ("One might think of 'the general public' as the collection of all groups too small (such as the typical family) or too large (such as consumers) to form effective interest groups.").

39. *See* OLSON, *supra* note 4, at 143.

such adventitious assistance."[40]

The set of businesses in any particular industry are the archetypal small, but powerful, concentrated interest groups. According to one public choice theorist, "The high degree of organization of business interests, and [their] power . . . must be due in large part to the fact that the business community is divided into a series of (generally oligopolistic) 'industries,' each of which contains only a fairly small number of firms."[41] One interesting and useful prediction of public choice theory is that the business community as a whole, which is a much larger group than the set of firms in an individual industry, will have relatively less influence than industry-specific business groups.[42]

Another factor that affects interest group power—identified by sociology rather than economics, but consistent with the public choice account—is whether the interest group is a repeat player.[43] In any legislative, regulatory, or litigation process, agents that participate in repeated rounds of competition will have strategic advantages. They can acquire specialized knowledge about how to optimize their chances of success within the process.[44] They can benefit from economies of scale and, by paying fixed costs upfront, have low start-up costs for any individual legislative or regulatory battle.[45] They cultivate relationships with the relevant decisionmakers.[46] Most importantly, they will be more willing to take short-term losses that will accrue long-term benefits—they can "play for rules."[47] In most regulatory contexts, the regulated industry exemplifies the

40. *Id.*

41. *Id.*

42. *See id.* at 145–46.

43. *See generally* Galanter, *supra* note 6. Although Galanter is not a public choice theorist and his article is focused on litigation rather than legislation and regulation, many of the basic arguments he offers to demonstrate why certain groups have advantages in litigation plausibly apply to legislation and regulation as well. In fact, Galanter appears to suggest that he focused on litigation in part because he takes it as obvious that powerful interest groups predominate in legislative and regulatory processes. *See id.* at 135 ("The various kinds of 'have-nots' . . . have fewer resources to accomplish changes through legislation or administrative policy-making. The advantages of the organized, professional, wealthy and attentive in these forums are well-known. Litigation, on the other hand, has a flavor of equality."); *see also* Richard Lempert, Comment, *A Classic at 25: Reflections on Galanter's "Haves" Article and the Work It Has Inspired*, 33 LAW & SOC'Y REV. 1099, 1111 (1999) ("I expect that the 'haves' have advanced their interests more through influencing legislation than through playing the litigation game for precedent.").

44. *See* Galanter, *supra* note 6, at 98.

45. *See id.*

46. *See id.* at 99.

47. *Id.* at 99–100.

repeat player.

Public choice theory predicts that regulated firms will use their political power to increase their profits in three ways. First, they will seek legislation or regulation that provides subsidies.[48] Subsidies could be direct, but they usually take the form of a tax credit or deduction. Second, incumbent firms will seek statutes and rules that create barriers to new firms entering the market.[49] Possible examples are licensing and permitting schemes, education and training requirements, or bonding and insurance mandates. Third, firms will seek policies that will advantage products or services that are complements to what they sell and that will disadvantage substitutes.[50] Many of these benefits are economic rents—payments in excess of the market value of an asset.[51] Thus, public choice theorists refer to firms' "rent-seeking" behavior.[52] Some have claimed that much of what we take to be public-interested regulation actually reflects rent-seeking.[53] If firms are successful, an agency may become "captured" by the firms it regulates, and the captured agency will use its regulatory power to generate economic rents for the incumbent firms in an industry.[54]

B. Critiques of the Public Choice Account

Critics have raised three types of objections to the public choice account of legislation and regulation: (1) the behavioral assumptions of the rational actor model are false, especially in the ideologically-charged world of political action;[55] (2) the public choice account of interest groups does not generate determinate predictions;[56] and (3) to the extent that public choice theory does yield determinate predictions, the empirical evidence is mixed.[57]

The criticism of public choice theory's behavioral assumptions is familiar from criticisms of the rational actor model in legal scholarship.[58]

48. *See* Stigler, *supra* note 3, at 4–5; *see also* Becker, *supra* note 27, at 380.

49. *See* Stigler, *supra* note 3, at 5.

50. *Id.* at 6.

51. For an explanation of the concept, see POSNER, ANALYSIS, *supra* note 21, at 9–10.

52. For a brief discussion of how public choice theorists use the phrase, see MUELLER, *supra* note 2, at 333–35.

53. For estimates of the social welfare losses from rent-seeking, see *id.* at 355–58.

54. *See, e.g.*, Posner, *Theories*, *supra* note 9, at 341–42.

55. *See, e.g.*, FARBER & FRICKEY, *supra* note 14, at 24–27.

56. *See, e.g.*, Posner, *Theories*, *supra* note 9, at 347–49; MASHAW, *supra* note 28, at 35–37.

57. *See, e.g.*, FARBER & FRICKEY, *supra* note 14, at 27–32.

58. For an introduction, see generally Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (summarizing criticisms of the rational actor model).

Behavioral law and economics scholars have drawn attention to the predictable ways in which observed behavior diverges from the rational actor model due to bounded rationality, bounded willpower, and bounded self-interest.[59] In the context of political action, the behavioral critique might be even stronger. Individuals with strong ideological motivations might self-select into political activity. Social norms might make ideological reasons for action salient or stigmatize acting as if political decisions were market transactions.

Even if legislators are largely self-interested and rational, they may not have as much need to maximize their chances of reelection as some public choice theorists assume.[60] Due to geography and gerrymandering, most legislative districts are safe and incumbent turnover is rare, so legislators may have less demand for interest group contributions and expenditures than public choice theory suggests.[61]

The standard response to criticisms of the microeconomic rational actor model is that the theory should be judged by its predictions, not by its assumptions.[62] Any model of human behavior will necessarily make simplifying assumptions, so the rational actor model may be a useful model of human behavior in spite of its false assumptions. In the context of public choice theory, proponents of the rational actor model argue that it has more explanatory power than the "public interest" theory of legislation and regulation that had prevailed before the rise of public choice.[63] In other words, it takes a theory to beat a theory, and public choice theory may be comparatively more accurate.

But if public choice theorists wish the theory to be judged on its predictions, they only highlight the importance of the critics' arguments that the theory does not generate determinate predictions. One common criticism is that there are obvious benefits, consistent with the rational actor model, to large groups. Larger groups have more potential voters.[64] They also have more potential donors.[65] Even if a greater percentage of those large group voters or donors are more likely to free ride than voters and

59. *See id.* at 1477–79.

60. *See* Croley, *Process*, *supra* note 10, at 43.

61. *See id.* (citing to empirical evidence).

62. *See, e.g.*, POSNER, ANALYSIS, *supra* note 21, at 17–18.

63. More recent variants of "public interest" theory may be less susceptible to the public choice critique. *See* Croley, *Process*, *supra* note 10, at 65–76 (describing and critically assessing the positive claims of public interest theory).

64. *See* MASHAW, *supra* note 28, at 34.

65. Steven Croley, *Interest Groups and Public Choice*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 49, 61 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

donors in small groups, the sheer size of the group may counterbalance the greater tendency to free ride. Public choice theory does not contend that the smallest possible group—an individual—will dominate. Instead, it predicts that "intermediate" groups will win out.[66] To the critics, this suggests that all public choice theory has accomplished is to point out the tradeoffs that group size creates for political organization. What the optimal group size would be is indeterminate. Consequently, when a law or rule might benefit one industry over another, it is difficult to know which industry public choice theory predicts will prevail.[67]

In some cases, public choice scholars disagree among themselves about what the theory predicts. For example, "some imagine that interest group bargains will be set out in quite specific terms in order to assure that value is actually received by the interest group for its contribution of either monies or votes."[68] Conversely, "others predict that interest group legislation will be vague in form and contain broad delegations of authority to administrative personnel."[69]

This criticism has its limits. Public choice theory clearly predicts that legislation and regulation benefiting the public as a whole and imposing costs on smaller groups will be less likely to succeed than laws and rules that benefit a small interest at the public's expense. Yet even that type of legislation may be difficult to identify because, as one critic puts it, "virtually any individual piece of legislation will generate both a plausible private-interest and a plausible public-interest explanation."[70]

It is perhaps unsurprising that, given these conceptual issues, the empirical evidence for public choice theory is thin.[71] Even back when Judge Posner was a more thoroughgoing enthusiast of the rational actor model, he was skeptical of the empirical evidence for public choice.[72] The theory struggles to explain the mundane observation that some part of the electorate does turn out to vote in the absence of an obvious self-interested reason to do so, without recourse to the unenlightening assumption that some individuals have a "taste" for political activity.[73] Econometric studies attempting to test public choice theories have produced mixed results.[74] Empirical case studies of particular legislation have concluded that interest

66. *See, e.g.*, OLSON, *supra* note 4, at 53–54.
67. *See* Posner, *Theories*, *supra* note 9, at 347–49.
68. *See* MASHAW, *supra* note 28, at 35.
69. *Id.*
70. *Id.* at 37.
71. *See* FARBER & FRICKEY, *supra* note 14, at 17–22.
72. *See* Posner, *Theories*, *supra* note 9, at 350–56.
73. *See* FARBER & FRICKEY, *supra* note 14, at 24–27; MASHAW, *supra* note 28, at 35–36.
74. *See* FARBER & FRICKEY, *supra* note 14, at 27–29.

group power did not explain the outcome in those cases.[75] Research on roll call votes finds that ideology, rather than interest group influence, predicts legislator behavior.[76]

But the relative dearth of empirical evidence supporting public choice theory does not decisively refute its claims. Legislators and regulators almost certainly have stronger self-interested reasons preventing them from simply acting on their ideological preferences that voters do. In addition, roll call votes might not tell us much about the underlying interest group influence buried in the details of legislation. One sympathetic critic of public choice theory has explained, "It is quite easy to concoct environmental legislation, for example, that is special interest in nature. But to see that it is, one must inspect the specifics of the legislation rather than focusing simply on the fact that . . . a clean water bill got passed."[77]

One assessment of public choice theory concluded, "A less grandiose version . . . would simply postulate (1) that reelection is an important motive of legislators, (2) that constituent and contributor interests thereby influence legislators, and (3) that small, easily organized interest groups have an influence disproportionate to the size of their membership."[78] This more modest version of public choice theory is plausible under existing evidence and can serve as a working conception of interest group influence over legislation and regulation. But, to be useful for generating prescriptions, the working conception needs to explain how and when interest group power can change.

II. THE LIMITS OF INTEREST GROUP POWER OVER TIME

Interest group power is dynamic. According to public choice theory, an industry's capacity to organize and influence politics depends on its size, wealth, and concentration. Such factors in turn depend on the state of technology, trade, and consumer preferences at any particular time. As the economy evolves, there will be residual effects on the political power of commercial interest groups.

The mere fact that interest group power can change, though, does not have significant consequences for political strategy. If the causes of change in interest group power were always exogenous to the political process, their relevance would be limited to the question of when certain political goals would become more or less viable. But some changes in the size,

75. *See id.* at 32–33; *see also* MASHAW, *supra* note 28, at 32–34.

76. *See* FARBER & FRICKEY, *supra* note 14, at 29–32.

77. *See* MASHAW, *supra* note 28, at 39.

78. *See* FARBER & FRICKEY, *supra* note 14, at 33.

wealth, and concentration of interest groups are endogenous to the political process. Legislation and regulation can be causes of, just as much as they are products of, interest group power.

In fact, public choice theory itself gives reasons to suggest how legislation and regulation might produce changes in interest group power. Consider the main aims that public choice theory attributes to interest groups representing the firms in one industry. As Part I explained, incumbent firm interest groups are predicted to seek subsidies, barriers to entry, advantages for complementary goods, and disadvantages for substitute goods.[79] Public choice theory explains that firms pursue these aims for economic, rather than political, reasons.[80] They will profit directly from subsidies, retain market share by imposing barriers to entry, and gain new consumers if the consumption of complementary goods increases or the consumption of substitute goods decreases.

But each of these economic benefits also has the potential to create *political* effects as well. Subsidies will make an industry wealthier and thereby enable it to afford more influence. Yet, they also might cause the industry to lose some of its organizational advantages if new firms enter the market and increase the size of the group. Creating barriers to entry reduces the chance that new firms will dilute the organizational power of the industry, but it also might reduce the growth of the industry. Altering the size of markets for complementary and substitute goods will affect the size, organization, and power of potential ally or adversary interest groups. These political effects will generally be the byproducts of an interest group's pursuit of legislation and regulation, but they could be motivations for political behavior as well, if firm interest groups were fully rational actors attempting to sustain or accumulate power over time.

The potential for legislation and regulation to alter the power of interest groups raises the possibility that political actors could enact legislation or pursue regulation that would reduce the power of currently dominant interest groups. But that possibility can only be realized if, contrary to expectations, the dominant interest groups fail to block legislation that poses a threat to their power.

This Part offers three reasons why currently powerful interest groups might not be able to thwart legislation that would reduce their power. First, the incentives of individual decisionmakers within an interest group or of the group's agents might encourage myopic decisionmaking. Second, in a federal system, a nationally dominant interest group might not have

79. *See* Stigler, *supra* note 3, at 4–6.

80. *See id.* at 4 (claiming that an industry is motivated to seek regulation "to increase its profitability").

sufficient influence over the state or local government that enacts unfavorable legislation. Third, for a variety of reasons, there are political asymmetries between subsidies and restrictive regulation, so groups that can block restrictions may not be able to block subsidies.

A. Myopic Incentives

Public choice theory emphasizes that the power of interest groups depends on the incentives of their members. For business interests, the theory takes the firm as its unit of analysis.[81] But just as the behavior of a business association depends on the incentives of individual firms, the behavior of a firm depends on the incentives of the managers that make its decisions, the shareholders who create incentives for managers, and the lobbyists that carry out the decisions managers make. As corporate law scholars have long recognized, the incentives of each of these individuals may diverge from the long-run interests of the firm.[82]

The main constraint on a firm's incentive to protect its long-term interest is the discontinuity of the individual actors that make its decisions.[83] Managers have limited tenures. While they internalize the benefits and costs of the short-term performance of the firm, they only internalize an attenuated portion of its long-term performance. After managers leave, it can be difficult to disentangle the causal effects of their decisions from the effects of subsequent managers. Even where the causal responsibility is traceable, the firm will find it difficult to monitor and sanction managers based on the expected effects their decisions will have on long-term performance at the time those decisions are being made. Monitoring would require a monitor who will internalize the future costs and benefits of

81. *See, e.g.*, OLSON, *supra* note 4, at 9.

82. *See, e.g.*, 1 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 2:7 (3d ed. 2014) ("The separation of ownership from control gives rise to various conflicts of interest between passive owners and active managers. In the abstract, managers are no different from other individuals when facing an economic choice; so as to maximize their own utility, they can be expected to act like other individuals in exercising discretionary decisions. Utility maximization is an especially interesting problem in the public corporation, where management and ownership are separated. The managers' quest to maximize their utility does not naturally lead to decisions that also maximize the value of the firm."). *See also* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 265–76 (1999); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308–11 (1976); Thomas S. Ulen, *The Coasean Firm in Law and Economics*, 18 J. CORP. L. 301, 312–14 (1993).

83. *Cf.* PAUL PIERSON, POLITICS IN TIME 120 (2004) (explaining the importance of actor discontinuity to long-term institutional dynamics).

the monitoring and have the power to act at the time the manager needs to be monitored.[84] Sanctioning would require some mechanism for the firm to have power over a manager after the manager leaves the firm.[85] For these reasons, managers will have short time horizons, and to some extent the firm's decisions will reflect those horizons.

Firms have some means to lengthen the time horizons of managers. After all, one standard justification for corporate law is to more closely align the interests of managers with the interest of shareholders.[86] At least in theory, shareholders can elect and replace corporate directors to ensure that managers protect shareholder interests.[87] But, while corporate law controls might prevent managers from making some self-serving decisions, they may only extend managers' time horizons to the time horizon of the median shareholder. Shareholders have no incentive to ensure that corporate boards and, in turn, managers, make decisions that will advance the firm's interest after the shareholder sells the stock.[88]

Due to the myopic incentives of shareholders and managers, firm decisions may discount the firm's long-term future interests more greatly than a unitary, continuous rational actor would. Therefore, the firm's political decisions may place less value on preventing long-term threats to the firm's political power.

In fact, in the context of political activity, there is a further layer of

84. *Cf. id.* at 114 (explaining the difficulty of monitoring).

85. *Cf. id.* (explaining the difficulty of sanctioning).

86. *See, e.g.*, COX & HAZEN, *supra* note 82, at § 2:7 ("A key point in the neoclassical economic view of the firm is that managers must have an incentive compensation arrangement that substantially ties their fortunes to that of the owners."); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 850 (2005) ("In publicly traded companies with dispersed ownership, the interests of management do not fully overlap with those of shareholders, and management thus cannot be automatically counted on to take actions that would serve shareholder interests. As a result, agency costs that reduce shareholder value might arise."). *But see* Lynn A. Stout, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PA. L. REV. 2003, 2010 (2013) (contending that "modern academics [have] long viewed as the core problem of corporate law . . . the agency cost problem of self-interested managers exploiting powerless shareholders" and critiquing that view).

87. *But see* Bebchuk, *supra* note 86, at 851–61 (explaining the limits of shareholder power to elect and replace directors).

88. *See, e.g.*, Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 205–13 (1991) (listing reasons for short-term bias in shareholders); *see generally* Kent Greenfield, *The Puzzle of Short-Termism*, 46 WAKE FOREST L. REV. 627 (2011) (arguing that short-term-oriented investors collude with short-term-oriented management to externalize long-term costs). *But see* Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 862 (1992) (claiming that "the available evidence strongly suggests that institutional investors are not *systematically* myopic") (emphasis in original).

myopia. Managers generally do not engage in political activity directly. Instead, a firm or a business association will retain lobbyists to implement its legislative and regulatory agenda. Lobbyists are imperfect agents for their firm or business association principals.[89] To the extent that managers are able to control lobbyist behavior, lobbyists' decisions will reflect the firms' myopic incentives. But because lobbyists also have limited tenures, lobbying firms add their own problems of actor discontinuity, imperfect monitoring, and imperfect sanctioning as well. Therefore, lobbyists will have the incentive to produce tangible short-term results for their clients, like seeking rents or halting regulation that would diminish rents. Lobbyists may not be able to demonstrate the value of efforts to prevent long-term erosion of the firm's or the industry's political power.

Lobbyists' incentives may also diverge from the interests of incumbent firms. If a lobbyist's skills are based on interactions with a particular regulatory agency and an associated Congressional committee, they might not have much incentive to ensure that incumbent firms preserve their position in an industry. As long as some wealthy potential clients will have an interest in the skills of a lobbyist who has relationships with regulators and legislators, the lobbyist will expect gainful employment. Thus, a change in regulation that shuffles the composition of the industry may not be as threatening to a lobbyist as it would be to the firms that the lobbyist represents.

This analysis of the myopic incentives of lobbyists is analogous in some respects to the "revolving door" metaphor that critics of the existing structure of regulatory agencies often raise.[90] These critics worry that agency officials will subtly serve the interests of industry while working at the agency, with the expectation that doing so will secure them lucrative employment after they leave government service.[91] Lobbyists may have parallel incentives to serve the interests of their future employers. If they believe that a regulatory reform will affect those who will benefit from relationships with the regulatory agency in the future, lobbyists may start to subtly serve the interests of their prospective employers, rather than their current ones.

Therefore, lobbyists, like managers and shareholders, will not always have an incentive to pursue the long-term interests of the firms that employ

89. For a more general discussion of the principal-agent problems between lobbyists and their clients, see generally Matthew C. Stephenson & Howell E. Jackson, *Lobbyists as Imperfect Agents: Implications for Public Policy in a Pluralist System*, 47 HARV. J. ON LEGIS. 1 (2010).

90. For a recent summary and critique of these arguments, see David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507, 512–22 (2013).

91. *See id.* at 512–16.

them. If a threat to a firm's or a business association's interest group power develops over several years or decades, the incumbents may not invest resources in responding to it. Those myopic incentives create the opportunity for deliberate strategies to alter interest group power.

B. Federalism

The federal system has long played a role in the dynamics of interest group power in the United States. For example, in 1886, Congress enacted the Margarine Tax Act, one of "the first instances of federal legislation in which one domestic industry sought to enlist the government's coercive power to stamp out competition from another domestic industry."[92] How did the dairy industry develop the power to persuade Congress that it ought to protect butter from margarine? The dairy industry started with state legislatures, where the cost of organizing was lower and the smaller number of individual firms in the state made it easier to overcome free-rider problems.[93] It focused on states like New York, Wisconsin, Pennsylvania, and Vermont, where dairy production was concentrated.[94] Over time, the dairy industry successfully obtained legislation prohibiting margarine in the leading dairy states.[95]

But after a state judicial decision rolled back New York's statute, the dairy industry began to organize at the federal level.[96] A national industry group, which was a successor to New York's organization, developed a plan for federal legislation.[97] The bill "drew on prior state legislation, borrowing those features that had been successful and scrapping the parts that had proved ineffective."[98] Its leading supporters were representatives from New York and other dairy states, and state dairy organizations lobbied for its passage.[99] President Grover Cleveland signed the bill into law, even though he personally recognized that it was largely the product of interest group power.[100]

The situation of the dairy industry in the 1880s differs from that of the interest groups with pro-regulatory incentives discussed here in a critical

92. Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83, 126–27 (1989).

93. *See id.* at 98.

94. *See id.* at 103.

95. *Id.* at 113.

96. *See id.* at 117–18; *see also* People v. Marx, 2 N.E. 29 (N.Y. 1885) (acknowledging the interest group politics behind dairy protectionism).

97. *See* Miller, *supra* note 92, at 120.

98. *Id.* at 121.

99. *See id.* at 122.

100. *See id.* at 126.

way: it was not an upstart seeking to challenge powerful interests. Rather, it was an incumbent seeking to halt the rise of a new entrant, margarine. But the history of the Margarine Tax Act illustrates how federalism allows interest groups to gradually build up power over time in state legislatures and to use that power at the federal level when the timing is auspicious.

This pathway to interest group power is a systematic feature of a federal system. In a unitary system of government, legislation and regulation must pass through a limited set of veto bottlenecks, which creates a smaller number of targets for political influence. A federal system like the United States introduces a multitude of state and local legislators that can enact favorable statutes and a multitude of state and local regulators that can promulgate rules. If these legislators and regulators respond differentially to influence from diverse interest groups *or* if national interest groups fail to exercise their influence at the state and local level, the interests that dominate the federal government might not dominate state and local governments.[101] There are four reasons why either one of those conditions might be true.

First, because political influence is often acquired through gradually developing relationships with decisionmakers, the interest groups with the most power in a particular legislature or regulatory agency will generally be those with ongoing interests—the repeat players.[102] There may be high initial fixed costs to investing in influence in one government—retaining lobbyists and lawyers that can provide contributions, expenditures, and connections to officials—and then smaller marginal costs to exercising that influence on an individual bill or proposed rule.[103] The high fixed costs of organizing may be recuperated over the course of repeated interactions.

Consequently, national interest groups that rarely have a stake in the outcomes of legislative and regulatory processes in state or local governments may not pay the initial fixed costs to acquire influence in those arenas. Thus, even if they do monitor the actions of state and local governments, when interest groups find that unfavorable legislation or regulation has been proposed in those governments, it may be too late to

101. *Cf.* Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 23 (2007) (arguing that states "are captured by a different set of interests than those dominant in Washington, D.C., because state constituencies contain a different mix of interests than the nation as a whole").

102. *See* Galanter, *supra* note 6, at 98–99.

103. *Cf.* OLSON, *supra* note 4, at 22 (explaining that there will be significant fixed costs to acquiring collective goods in "virtually all cases"). Olson's point is about the cost of organizing generally, but it could be equally true of organizing in a new jurisdiction.

develop the relationships that can affect its chances.[104] Because acquiring influence in all state and local governments would be too costly, national interest groups might invest only where they can reasonably predict unfavorable legislation, but those may be the governments least susceptible to their influence.

The expenses national interest groups face in organizing at the state and local level must be balanced against the lower cost of influence at those levels. Yet although state and local legislative campaigns generally cost much less to run than federal campaigns, even the smaller cost of organizing at subnational levels might not appear worthwhile to firms if, unlike at the federal level, there is no short-term threat of legislation or regulation.

Second, many interest groups, especially business associations, rely heavily on their capacity to employ voters for political influence, and employment is geographically concentrated.[105] The connection between providing employment and gaining influence works in two ways. It can provide a sincere reason for voters and the politicians who represent them to support an industry's agenda. The voters that an industry employs and the voters who benefit from an industry's spillover effects on the local economy will be inclined to support policies that keep those jobs available. Legislators will respond to those pressures and also might independently value keeping those jobs with their constituents. An industry's capacity to employ might also work in a more subtle way as a pretext. A legislator can accept contributions from an industry and justify taking that money on the ground that they support the industry because it is a local employer.

At the federal level, a mobile industry can maximize its influence by employing voters in as many districts as possible. It can also economize on influence by employing voters in the districts of the relevant committee members.[106] At the state and local level, the prospects for influence

104. Garrick Pursley and Hannah Wiseman argue that local governments, as opposed to state or federal governments, may be able to enact policies adverse to utility lobbies because those groups need to rely "on 'fire alarm' rather than 'police patrol' monitoring of regulatory activity to alert them to initiatives on which their interests require intervention." Garrick B. Pursley & Hannah J. Wiseman, *Local Energy*, 60 EMORY L.J. 877, 928 (2011) (citing Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984)).

105. *Cf.* Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 89 (1990) ("The cigarette manufacturing lobby has the same right to operate in Massachusetts as in North Carolina. If lobbying dominated legislative choices, we would expect the tobacco lobby to have as much success with a senator from Massachusetts as with a senator from North Carolina.").

106. There is empirical evidence that the constituencies of committee members receive disproportionate benefits from legislation passed through those committees and that firms

through employment are more daunting. For all but the most dispersed industries, there are simply too many states and localities to influence. So, in some state and local legislatures, industries will lack the employment-based influence they possess nationally, and legislators will lack the political cover that the job creation argument provides.

Third, there is a political stigma to accepting out-of-state money in political campaigns.[107] Candidates can and do highlight outside interest groups funding their opponent's campaigns. For this reason, state and local legislators may be more willing to accept contributions from interests within their jurisdictions, even if national interest groups can outspend them. Of course, this point hinges on the transparency of campaign finance. If national groups can cloak their influence, state and local legislators may be able to avoid the stigma and be susceptible to influence.

Fourth, the ideological divergence between state or local electorates and the national electorate could constrain the power of national interest groups in some subnational legislatures. Some ideologically salient industries, like firearms, are welcomed in rural counties and loathed in cities or vice versa. Others, like tobacco, are more unpopular in states in certain regions of the country than others. Even less controversial industries might find some state legislatures less accommodating because those states are more broadly supportive of regulating industry. The differences in state and local preferences might not be limited to the left-right divide. Some jurisdictions, for example, have political cultures that favor innovation and start-ups, while others prefer to protect established firms. To the extent that these ideological constraints limit the political viability of particular legislation or simply limit legislators' willingness to accept contributions from or cooperate with certain interest groups, nationally powerful interest groups might not have equivalent power in state and local governments.

For these reasons, interest groups that are disfavored at the federal level can use their power in state or local legislatures—and the rents it can provide—to build up a rival power base and grow. Eventually, they may be able to challenge the balance of the power at the federal level as well.

One could object that national interest groups can solve all of these federalism problems through preemption. Thanks to the Supremacy

target their political contributions accordingly. *See, e.g.*, Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 152–55 (1988).

107. Some states have attempted to limit out-of-state contributions, and some of these attempts have been invalidated on First Amendment grounds. *See* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1137 (2014).

Clause, Congress can preempt state and local regulation.[108] Interest groups with power at the federal level would likely find it less expensive to lobby for preemptive legislation than to set up and operate a lobbying presence in state and local governments.

But national interest groups might have several reasons to oppose preemptive statutes. Although a national interest group may have less influence in *certain* states or localities than they have at the federal level, they may have more influence in other subnational governments. Where that is true, interest groups must weigh the protection that a preemptive statute might provide in unfavorable jurisdictions against the reduced flexibility it provides in favorable jurisdictions.[109]

Even if the national interest group as a collective would, on balance, benefit from federal preemption, some firms within the group might benefit more from the parochial benefits they receive in the state or locality in which they have influence. Dissensus within the national interest group might lead it not to take a position on preemption.

In some cases, national interest groups might benefit from competition among states. When capital is mobile, industry often stands to benefit from a race-to-the-bottom among states competing for businesses to locate within their borders using favorable regulation, subsidies, or tax credits.[110] Therefore, industry groups might oppose preemption because it would shut down the race-to-the-bottom.

Moreover, the political economy of many regulatory issues is more complicated than the scenario in which one national interest group dominates. There may be a set of competing influential interest groups, and the best way for legislators to maximize their support is to refrain from passing federal legislation so as to permit them all to seek customized solutions in the state and local governments in which they are comparatively more powerful.[111]

Finally, it is worth reiterating that whether national interest groups succeed in blocking challenges to their power from rivals building up a base

108. U.S. CONST. art. VI, cl. 2.

109. *See* Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward A Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 276–81 (1990) [hereinafter Macey, *Federalism*] (arguing that beneficiaries of a state "regulatory regime that accumulates particularized expertise, reputational value, or human capital in a specific subject area," such as Delaware's corporate law or Connecticut's insurance law, will seek to protect those asset-specific investments from federal preemption).

110. The extensive literature on the race-to-the-bottom argument began with Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211–12 (1977).

111. *See* Macey, *Federalism*, *supra* note 109, at 281–84.

in state or local governments does not depend only on whether they have the capacity to do so. They must be aware of the potential threat to their influence and have the incentive to act on it. Because national interest groups might not closely monitor the activities of state and local governments, they may not recognize long-term threats until the political economy of a preemptive statute has changed.

C. Subsidies v. Taxes

The form of the benefit that interest groups aim to acquire or the cost they aim to avoid might also affect their success at influence. If firms' behavior were strictly rational, in a zero sum game with competitors, they would be indifferent to choosing between a law that imposed a tax on them and a law that granted a subsidy on their competitors. If legislators internalized the cost of adding to the public debt or imposing taxes as much as they internalized the benefit of public spending, they would demand equal compensation for spending on a subsidy as they would for not imposing a tax. But neither of these assumptions is always true, and the asymmetries between subsidies and taxes create opportunities for less powerful interest groups to grow and acquire power over the long term.

The asymmetry between subsidies and taxes has two causes—cognitive and political. Firms rely on human decisionmakers, and thus their decisions will often reflect human cognitive biases. One such bias is "loss aversion"—the tendency to place more value on avoiding losses from a pre-existing baseline than on acquiring gains from that baseline of equal magnitude.[112] There is extensive literature in cognitive psychology demonstrating loss aversion in experimental and real world decisionmaking contexts,[113] and there is also a literature in behavioral law and economics demonstrating that loss aversion pervades legal doctrines and institutions.[114]

If managers and lobbyists are loss averse, they will be more strongly motivated to prevent legislatures from imposing taxes or other restrictive regulations than they will be to gain subsidies. Likewise, even when business associations view their industry as a zero sum game with potential competitors, they should be more motivated to oppose taxes on themselves than subsidies for their competitors.

The cognitive asymmetry favoring subsidies over taxes interacts with a

112. The classic article is Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 ECONOMETRICA 263 (1979).

113. For a non-technical discussion, see DANIEL KAHNEMAN, THINKING, FAST AND SLOW 283–86 (2011).

114. *See generally* Eyal Zamir, *Loss Aversion and the Law*, 65 VAND. L. REV. 829 (2012).

political asymmetry.[115] When legislators enact a targeted subsidy, they can receive compensation from the concentrated interests it benefits and distribute the cost of that subsidy across the public as a whole by raising taxes or adding to the debt. Conversely, when legislators impose a targeted tax or other restriction, they impose a cost on concentrated interests and distribute the benefits across taxpayers or future generations. Therefore, targeted subsidies will be much easier to pass than targeted taxes.

To be clear, subsidies often take the form of a tax credit rather than a direct subsidy, but this is because they "are perceived as unobtained revenue, rather than as direct spending. Consequently, they encounter less resistance on the part of those who do not receive them and are less stringently scrutinized."[116]

Legislators also have a more general incentive to pass fiscally expansionary policies, which will generally increase employment and stimulate the economy through multiplier effects. If this spending is debt-financed, the economic cost will be deferred to future generations. The political cost will be deferred to future legislators. This is another example of myopic incentives at work.

The upshot of this political analysis is that, per dollar of lobbying expenditure, it will be easier to procure a subsidy—or a tax credit—rather than a tax or restrictive regulation. This conclusion matters to the power of interest groups if subsidies exhibit diminishing marginal returns. They may be more valuable to a nascent firm or industry than to established ones. Loss aversion reinforces this power dynamic. Incumbent interest groups may be more motivated to prevent a legislature from imposing taxes or restrictions on themselves than to prevent a legislature from giving subsidies to their competitors. The net effect is that interest groups with relatively little money to influence legislators can spend efficiently on subsidies.

Over time, subsidies can gradually build up a new industry. While incumbent firms may have avoided the direct economic threat of taxes or restrictive regulations, they may have missed the indirect political threat of subsidies to rivals. That can be a consequential mistake. An industry's capacity to avoid direct economic threats like taxes and restrictive regulation over the long run depends on their continuing political influence.

115. *See generally* Andrew Green, *You Can't Pay Them Enough: Subsidies, Environmental Law, and Social Norms*, 30 HARV. ENVTL. L. REV. 407 (2006) (conceding that subsidies are politically easier than taxes but criticizing them for, *inter alia*, being susceptible to rent seeking).

116. *See* Zamir, *supra* note 114, at 866.

D. Why the Limits Matter

Each of these limits on interest group power creates an opportunity for less powerful groups to obtain influence. The most important opportunities might be interactions among myopic incentives, federalism, and the asymmetry between subsidies and taxes. The change in interest group power might come from a firm that builds its power over time from a regionalized base, a subsidy to a firm that will only have an adverse interest in the future, a subsidy out of a state or local budget, or a combination of all three factors.

Changes in the ways by which interest groups hold power will not always result in new legislation and regulation. Even when the new economy of influence does lead to new legislation or regulation, there is no a priori reason to expect that it will benefit the public interest rather than the interest of newly powerful private groups. But some changes in the balance of private power can advance the public interest, and those changes are partially predictable.

Parts III–V analyze the political economy of risk regulation. They identify the three primary groups that can have a predictable private interest in public-interested health, safety, and environmental regulation. Part III examines business firms that have some interests that conflict with the interests of powerful risk-creating industries. Part IV focuses on insurers, a set of wealthy, influential businesses unusual among large commercial interests in their capacity to profit from risk reduction. Part V considers lawyers, some of whom stand to gain from suits against risk-creating firms.

In each of these three categories, the analysis is complicated. Industry, insurers, and lawyers have the potential to engage in socially wasteful rent-seeking. The alignment between their private interest and the public interest is, by definition, coincidental. But, for each group, carefully designed legal interventions may encourage that alignment, enhance their influence, and ultimately lead to justified regulation.

III. INDUSTRY

A. Theory

To understand the potential for private firms to support public-interested risk regulation, we need a model of a firm's incentives. The archetypal firm in this model is the risk-creating firm. Firms can create risks to health, safety, and the environment in three ways. First, their products and services can pose risks for the intended consumer. Second, the process that produces the firm's goods can pose risks to its employees. Third, the firm's activities can create externalities, risks to individuals who are not in a contractual relationship with the firm. We can call those who bear the cost of externalities "bystanders," even though in most cases they will not be literal bystanders.

Risk regulation aims to mitigate all three types of risk—to consumers, workers, and bystanders. In the case of bystanders, the justification for regulation is straightforward. Bystanders cannot bargain to avoid the cost of externalities. Firms need to be required to internalize the costs they impose on others to minimize total social cost. In the case of consumer and worker protective regulation, the justification is more complicated. According to the rational actor model, consumers and workers should take these costs into account when deciding whether to do business with the firm. But, as economists have long conceded, consumers and workers may not appreciate these costs because they have imperfect information and are on the disadvantaged side of an information asymmetry with the risk-creating firm.[117] Even if they are fully informed of the risk, their ability to act on it may be limited due to bounded rationality.[118] Risk regulation can be justified as a means to protect consumers and workers against these predictable market failures.

Risk regulation achieves these ends by imposing costs on risk-creating firms: banning or restricting certain activities or methods; requiring permits, licenses, training, or education; mandating disclosure, labeling, or informed consent; or taxing the firm or activity directly. According to public choice theory, associations of risk-creating firms will seek to remove these costs to incumbents and impose these costs on potential new entrants.[119] The potential for firms to endorse public-interested risk regulation exists when there are firms which have an incentive to impose costly regulation on incumbent risk-creating firms.

There are two broad categories of firms that might have such an incentive. One category is differentially risk-creating firms, which produce the same goods or provide the same service as incumbent risk-creating firms, but do so in a way that creates less risk for consumers, workers, or bystanders.[120] Examples of differentially risk-creating firms include those

117. *See, e.g.*, POSNER, ANALYSIS, *supra* note 21, at 182–83.

118. *See* Jolls et al., *supra* note 58, at 1477–79.

119. *See* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 572 (2001) ("The impetus for environmental regulation sometimes comes, implicitly or explicitly, from the regulated firms themselves, which can obtain rents and barriers to entry that give them an advantage over their competitors.").

120. *See id.* at 573–74 (analyzing the incentives that "Differential Costs on Regulated Firms" create).

that produce cleaner energy, safer cars, or healthier foods. The other category is risk-mitigating firms—firms that produce goods or provide services designed to mitigate the risks that risk-creating firms produce.[121] This category includes firms that produce smoke alarms, motorcycle helmets, and pollution scrubbers. Firms in both of these categories will sometimes stand to profit from public-interested risk regulation, but not always.

Differentially risk-creating firms face a choice whether to join or defect from a risk-creating industry's political coalition. If they defect, they will be able to lobby for, and potentially procure, regulation that gives them a competitive advantage over other firms in the industry. The regulation might require other firms in the industry to adopt their product features or production process or otherwise move toward the differentially risk-creating firm's performance.[122] The differentially risk-creating firm can realize the benefit of its first-mover advantages, as other firms engage in research and development or costly transitions.[123] It might also benefit from possessing relevant intellectual property, which it can license to other firms in the industry.[124]

A differentially risk-creating firm will pay a price for defecting from an industry association. The firm will no longer have a vote in the industry's lobbying efforts on issues of mutual concern, and the industry can lobby for regulations that target the defector. Whether the benefits of defecting outweigh its costs will depend on the specific facts of the situation. The degree of difference between the defector firm's risk creation and the median firm in the industry's risk creation will be one, but not the only, factor driving the decision.

Risk-mitigating firms do not need to defect from industry associations, but these firms may actually be more susceptible to industry pressure. They have the incentive to lobby for regulation that will create a market for their products and services in the form of rules requiring firms to purchase the products and services or standards that make it economical to do so.[125] But

121. *See id.* at 574–75 (analyzing the benefits of regulation to "Producers of Pollution Control Equipment and Inputs to Production Processes").

122. *See id.* at 573 ("Some firms may be able to adjust their production processes more easily than others. These relative beneficiaries of government regulation are likely to oppose relaxing regulatory requirements and may even favor extending them.").

123. *See* Marvin B. Lieberman & David B. Montgomery, *First-Mover Advantages*, 9 STRATEGIC MGMT. J. 41, 41–47 (1988).

124. *See id.* at 43–44.

125. *See* Revesz, *supra* note 119, at 574 ("The impetus for regulation sometimes comes from manufacturers of pollution control equipment, environmentally friendly technologies, or inputs to production processes favored by the regulatory regime.").

because that kind of regulation would impose costs on the risk-creating industry, risk-mitigating firms might not pursue it. If a risk-mitigating firm markets its product or service directly to the risk-creating firms, the risk-creating firms might decide not to do business with the risk-mitigating firm. If the risk-mitigating firm markets to consumers, risk-creating firms might make the products or services they market to consumers incompatible with what the risk-mitigating firm provides. The mere threat of these scenarios might deter risk-mitigating firms from seeking regulation that is otherwise in their interest.

These reasons why differentially risk-creating firms and risk-mitigating firms might not want to cross risk-creating industry associations, however, assume that the lobbying activity will be transparent and that the risk-creating firms will retaliate swiftly. It is plausible that neither of the assumptions will be true in practice. But even if they were true, the economic gain of the regulation might outweigh the loss that industry retaliation will cause.

B. Empirical Plausibility

Different sources of energy emit carbon at different rates, so energy firms that rely on cleaner sources—differentially risk-creating firms—will have a competitive interest in tighter regulation. Firms that rely heavily on renewable fuels are the simplest example, but even firms that rely on natural gas or nuclear energy might support carbon regulation if they anticipate that it will lead them to gain market share over firms more reliant on coal. The same is true for utilities that have an energy portfolio less reliant on fossil fuels generally or coal specifically.

Eric Biber argues that California has successfully created an interest group base for regulation to reduce carbon emissions by gradually subsidizing its renewable energy industry.[126] He points to California's tax credits and subsidies for renewable energy in the late 1970s and early 1980s, California's renewable portfolio standard for utilities passed in 2002, and California's more comprehensive regulation of greenhouse gases in 2006.[127] These measures, he claims, built up a clean energy industry in the state, tied jobs to its future, and thereby changed the incentives of utilities and other energy businesses.[128]

In 2010, California voted on Proposition 23, a ballot initiative that would have reversed the 2006 climate change legislation. The two largest contributors to the campaign were Texas-based firms Valero and Tesoro,

126. *See* Biber, *supra* note 18, at 401–02.
127. *See id.* at 420–21.
128. *See id.* at 421–25.

which opponents attacked as "Texas oil companies."[129] Important business interests, such as the California Chamber of Commerce, Chevron, and the Western States Petroleum Association, that had traditionally opposed environmental regulation, including the 2006 law, did not contribute to the campaign.[130] One of the state's largest utilities, Pacific Gas and Electric, which had heavily invested in renewable energy, actually contributed to the opposition.[131] Proposition 23 failed by over 20 percent.[132] Biber concludes,

> While there may have been multiple reasons for the change in position, including a strategic calculation that the ballot initiative was a losing proposition not worth investing in compared to lobbying in the legislature, another possibility is that investments made by California firms in the wake of [the 2006 legislation] in order to comply with the law made further resistance unattractive.133

Each of the three dynamic limits on the power of interest groups played a role. The development of pro-regulatory interest groups occurred over decades. That development critically relied on idiosyncratic features of California's, rather than the nation's, political economy. The legislation that initiated the change in interest group power took the form of subsidies and tax credits, but when the power of clean energy interest grew, the legislature was willing to enact restrictive regulation.

Could California's victory for more aggressive environmental regulation be repeated at the federal level? With the prevailing balance of interest group power, it probably could not. But as the national renewable energy industry grows in California and other states and as the federal government encourages that growth with subsidies or tax credits, it is plausible that the political will for federal environmental legislation will become strong enough to tip the balance.[134]

C. Conflicting Interests

The main difficulty with subsidizing differentially risk-creating firms or risk-mitigating firms is that they are incentivized to seek regulation that

129. *Id.* at 413, 417.

130. *See id.* at 424–25.

131. *Id.* at 415–16.

132. Biber, *supra* note 18, at 400.

133. *Id.* at 425 (footnotes omitted).

134. Some interest groups are potential winners from climate change, and they might be a countervailing force against legislation even if a stronger democratic consensus around the existence of climate change emerges. *See generally* J.B. Ruhl, *The Political Economy of Climate Change Winners*, 97 MINN. L. REV. 206 (2012).

creates or enlarges a market for their product or service, rather than regulation that simply reduces the risk in the most efficient way. This potential misalignment between a firm's interest and the public interest is particularly problematic if, as is the case for many areas of risk regulation, the technologies that risk-creating, differentially risk-creating, and risk-mitigating firms market are developing rapidly. Because empowering interest groups to pursue regulation is a long-term project, the potential that the misalignment widens in the interim is significant.

The history of ethanol subsidies offers a cautionary tale. In 2005 and 2007, Congress enacted legislation designed in part to increase the amount of ethanol in gasoline.[135] Lobbying from corn-based ethanol producers was in large part responsible for the legislation.[136] Although proponents defended the subsidies on environmental grounds, the increased use of ethanol did little to mitigate environmental risks and may have exacerbated them and raised food prices in the developing world as well.[137]

The ethanol case is not a perfect example because most energy experts doubted that a transition to ethanol would bring a net benefit to the environment even at the time of the initial decision to subsidize it.[138] But some environmentalists did support ethanol as a happy marriage of convenience between a powerful corn lobby and a perceived strategy for reducing the consumption of fossil fuels.[139] At least in theory, the ethanol industry might have become a lobbying force supporting the regulation of fossil fuels. Arguably, a similar dynamic is at work today, as some environmentalists endorse the expansion of the natural gas industry, reasoning that switching to gas from coal will reduce carbon emissions. That reasoning is correct for now—the rise of natural gas energy has reduced emissions by displacing coal[140]—but the strength of natural gas interests in the future may be an obstacle to regulation that would compel a transition to renewable energy.

135. Arnold W. Reitze, Jr., *Biofuels—Snake Oil for the Twenty-First Century*, 87 OR. L. REV. 1183, 1202–03 (2008).

136. *See id.* at 1203.

137. *See id.* at 1203–12.

138. *See id.* at 1204–05.

139. *See id.* at 1203–04 (stating that "environmentalists . . . were advocating the use of alcohol fuels" in the 1990s).

140. U.S. ENERGY INFO. ADMIN., U.S. ENERGY-RELATED CARBON DIOXIDE EMISSIONS, 2012 vii–ix (2013), *available at* http://www.eia.gov/environment/emissions/carbon/archive/2012/pdf/2012_co2analysis.pdf (concluding that "the increase in natural gas-fired generation, while coal-fired generation decreased, substantially reduced the carbon intensity of electricity generation" in recent years).

D. Prescriptions

In the case of fossil fuel emissions, the optimal regulation may be a carbon tax, which would directly cause firms to internalize the cost of carbon emissions. One benefit of a carbon tax is that it does not require the government to "pick winners" in the contest for cleaner energy. Whatever technology reduces the risk most efficiently—whether it is a differentially risk-creating technology like natural gas or a risk-mitigating technology like carbon sequestration—would be the least expensive means to comply with the regulation. However, in part due to the political asymmetry between taxes or restrictive regulation and subsidies, carbon taxes are rare and clean energy subsidies are commonplace.

The challenge then is to design legislation that takes the form of a subsidy or tax credit yet is broad enough that it will not advantage any particular technology, thereby creating an interest group with ultimately counterproductive incentives. California's early subsidies, which exclusively focused on the renewable energy industry, might not have opened the possibility for cleaner fossil fuels or carbon sequestration, but they avoided promoting ethanol. Congress enacted a small subsidy program of production tax credits for renewable energy in the Energy Policy Act of 1992 and subsequent renewals, and that program may have helpful interest group effects in the long run. The future effects may even be greater if the tax credits were larger.[141]

Generalizable lessons can be drawn from these experiences with energy subsidies. Differentially risk-creating firms can be a powerful force for public-interested risk regulation, and it is at least plausible that they might be able to ally with risk-mitigating firms on some issues as well. Even so, they will often have incentives to push legislation and regulation that more narrowly favors their products and services than a purely public-interested regulation would. There are four potential strategies to address this problem while still working around currently powerful risk-creating interest groups.

First, legislators could subsidize a diverse set of differentially risk-creating or risk-mitigating firms, so that no one particular firm's technology would dominate. The market might help determine which of the subsidized firms grew enough to become a powerful interest group in the future. In the best-case scenario, the subsidized firms could form an issue-based coalition to lobby for generalized regulation that was not achievable before the

141. *See* Gilbert E. Metcalf & David Weisbach, *The Design of a Carbon Tax*, 33 HARV. ENVTL. L. REV. 499, 552–53 (2009).

subsidy.

Second, the subsidy could be distributed through grants from a commission of independent, technocratic experts. This is, of course, how the government distributes funds for most of its scientific and medical research. The commission would be able to decide which technologies were the most promising based on their merits. It could recalibrate its distributions as experimental results rolled in. The commission's insulation from interest group pressure would cause it to distribute grants to firms that would be the most useful interest groups for pursuing public-interested regulation.

Third, the subsidy could take the form of a prize.[142] For example, the government could award a prize to a firm that demonstrates a technology capable of achieving some risk-reducing goal within some cost constraint. The advantage of a prize system is that it allows private actors maximum flexibility to select the most efficient means to reduce the risk. At least in theory, firms working toward the prize would be able to finance research and development with funding from investors willing to bet on the firm's strategy in exchange for a share of the prize. If investors bet well, the right firms would gain interest group power.

Fourth, and most controversially, the subsidy could be targeted at existing risk-creating firms. For example, Congress could give existing energy firms an incentive to open renewable energy plants. The hope would be that opening this line of business might, over time, reorient the interests of the risk-creating firms. The obvious downside to this approach is that money is fungible, and the risk-creating firms could use that money for lobbying that would undermine public-interested risk regulation. But the benefit is that such a subsidy would be especially easy to achieve politically. If it could be carefully designed so as to compel risk-creating firms to significantly invest in less risk-creating technologies, it could work as a Trojan Horse strategy to change the political agenda of firms from the inside.

IV. INSURERS

A. Theory

Insurance markets exist because of the persistence of irreducible risks to life, health, and valuable property. In the long term, insurers stand to lose from technological and social developments that will reduce risk and, in

142. For an economic analysis of the incentives that prizes create, see generally Steven Shavell & Tanguy Van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J.L. & ECON. 525 (2001).

turn, the demand for insurance coverage. But in the short and medium term, insurers stand to profit from certain kinds of reductions in risk and, therefore, have an incentive to support certain kinds of regulations that reduce risk.

Insurance markets can create two kinds of information asymmetries—adverse selection and moral hazard. Adverse selection occurs when potential insureds have private knowledge about their own riskiness and use that information when they decide whether to purchase an insurance policy, leading high-risk individuals to be more likely to purchase insurance.[143] Moral hazard occurs when insureds take less precaution against risks because they have purchased insurance policies to cover the consequences of those risks.[144]

Insurers have developed strategies for reducing both types of information asymmetries. They reduce the chance of adverse selection through underwriting, risk classification, and ex post investigation.[145] They reduce the chance of moral hazard through underwriting, deductibles, copayments, and refusals to insure.[146] But none of these strategies completely eliminates information asymmetries, and therefore insurers still have an incentive to support regulation that further reduces such asymmetries. There are three main reasons for this incentive: the temporal lag between when premiums are set and when losses that lead to claims occur; the competition among insurers; and the predictability of risk.

First, there is a temporal lag between when insurers and insureds assess the risk being insured and when that risk materializes, if it does at all.[147] At least in a market with perfect information, a reduction in risk that occurs prior to when an insured purchases a policy or renegotiates a premium

143. The seminal article on adverse selection is George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970). For a critique of assumptions about adverse selection in insurance law scholarship, see generally Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L.J. 1223 (2004).

144. For a history of the concept, see generally Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996).

145. Siegelman, *supra* note 143, at 1261–62.

146. *See* Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 205–09 (2012). For empirical evidence that insurers' activities reduce moral hazard, see Haitao Yin et al., *Risk-Based Pricing and Risk-Reducing Effort: Does the Private Insurance Market Reduce Environmental Accidents?*, 54 J.L. & ECON. 325 (2011). But, for an argument that insurers' efforts to reduce moral hazard over history were aimed primarily to legitimate their business and, in some cases, were based on dubious stereotypes, see Baker, *supra* note 144, at 244–67.

147. *See* Ben-Shahar & Logue, *supra* note 146, at 204.

should be incorporated into the cost of the policy and the level of the premiums. In a competitive market, when some significant reduction in risk occurs, insurers will need to adjust premiums downward or be undercut by competition. But insurance policies may have lengthy terms, and premiums may be reset infrequently; thus, any reduction in risk that occurs between when a premium is initially set and when the risk materializes into a loss that gives rise to claim will reduce what the insurer needs to pay out. Consequently, insurers have a strong incentive to support regulation that reduces risk over the short and medium term.

Second, in addition to the general incentive the whole industry has to reduce risk, individual insurers may stand to benefit competitively from the reduction of the particular risks.[148] This would be the case, for example, if the risk reduction were concentrated in a market segment or a jurisdiction in which the particular insurer has a greater market share. Insurers might also benefit competitively from a reduction in risk simply because they anticipated it and set policies accordingly. Now, of course, the limitation to this incentive is that insurers, like most firms, engage in much of their political activity through industry associations, which can be expected to pursue regulations that benefit the interests of the industry as a whole. But it is plausible that regulation will reduce risk across the board because of temporal lag, but reduce risks even more for particular firms. For this reason, the insurance industry's lobbyists might seek risk-reducing regulation, even if one firm supports it more for competitive reasons.

Third, insurers also have a more subtle incentive to reduce risk because they prefer more easily quantifiable and predictable risks. When an insurer can easily quantify and predict a risk, it is less prone to adverse selection and it can take steps to reduce moral hazard. Therefore, whether insurers decide to insure a risk hinges in part on whether the risk can be predicted and quantified. But even once an insurer has decided to insure a given risk, it still gains from greater predictability by being able to price premiums more accurately. One fortunate consequence of this preference for predictable risks is that insurers prefer to insure risks to property, which are easily quantifiable, rather than risks to physical harm and suffering, which can vary wildly, especially but not exclusively if jury damage decisions are involved.[149] So, in some cases, insurers will have the incentive to seek regulation that transmutes health and safety risks into property risks.

Because of these incentives, one should expect insurers and insurance

148. *See id.*

149. *See generally* Robert Kneuper & Bruce Yandle, *Auto Insurers and the Air Bag*, 61 J. RISK & INS. 107 (1994) (explaining insurers' lobbying for air bags on the ground that they reduce actuarial uncertainty).

industry associations to be strong political supporters of aggressive risk regulation, unless that regulation would limit a risky yet insurable activity entirely. The insurance industry also has other distinctive features that make them especially valuable interest groups. Insurers have deep pockets, which gives them a significant budget for lobbying.[150] The insurance market is highly concentrated, and thus the industry has the classic organizational advantages that public choice theory predicts.[151]

More abstractly, since insurers are highly regulated, they benefit from being repeat players and are continually invested in influencing public policy.[152] Because of the nature of their business, they are accustomed to long range planning. In the United States, insurance is primarily regulated at the state level, so insurer interests can sometimes achieve regulation in particular states that would not be viable at the federal level initially and then move to expand that regulation after interest group power changes.

B. Empirical Plausibility

Insurers have a long history of lobbying for risk regulation. Property insurers have, for example, lobbied for changes in and more enforcement of building codes.[153] However, the most dramatic examples have come from the lobbying of auto insurers.

One reason why auto thefts have declined so much in recent decades is the widespread adoption of the clandestine radio transmitter device called LoJack. LoJack allows police to track a car after it has been stolen, increasing the likelihood that the car is ultimately recovered. Because potential thieves cannot distinguish between vehicles that have and that do not have LoJack installed, as it is added to more vehicles in a region, auto theft becomes less lucrative at a greater than linear rate. Therefore, much of the benefit of LoJack—a lower general rate of auto theft—is externalized because it accrues to car owners other than the owner who installs the

150. The insurance industry contributed $58.7 million to federal parties, candidates, and outside groups in 2012 and spent more than $154 million on federal lobbying in 2013. Viveca Novak, *Insurance: Background*, CTR. FOR RESPONSIVE POL., http://www.opensecrets.org/industries/background.php?cycle=2014&ind=F09 (last updated Aug. 2014).

151. *See, e.g.*, D. ANDREW AUSTIN & THOMAS L. HUNGERFORD, CONG. RESEARCH SERV., R40834, THE MARKET STRUCTURE OF THE HEALTH INSURANCE INDUSTRY 27–29 (2009).

152. Galanter uses insurance companies as an example of archetypal repeat players in litigation. *See* Galanter, *supra* note 6, at 97.

153. *See also* Ben-Shahar & Logue, *supra* note 146, at 212.

device.[154] Auto insurers have an interest in reducing theft for a wide base of insureds, so they have lobbied successfully to change state laws to increase the insurance discount for LoJack.[155]

But while the LoJack example demonstrates that insurers have lobbied for risk-reducing regulation, there was no obvious lobbying force opposing the LoJack requirement. In contrast, auto insurers faced powerful opponents when they lobbied for regulation requiring airbags. Scholars have argued that insurers' preference for easily quantifiable and predictable risks explains their persistent lobbying efforts for mandatory air bags.[156] Despite opposition from automakers, who argued for mandating seat belts as a lower cost alternative,[157] insurers successfully pressured the federal government to adopt a mandate and successfully litigated to overturn the Reagan Administration's brief rescinding of the rule.[158] Insurers favored air bags because they would reduce the most severe types of injury, which could lead to unpredictable jury awards and because they transmuted highly volatile bodily injury losses into property losses.[159]

C. Conflicting Interests

Insurers have an interest in undermining laws designed to protect insureds. Just as insurers have the salutary incentive to lobby for regulations that reduce the risk of adverse events that could give rise to claims, they also have the pernicious incentive to lobby for regulations that allow them to deny claims when those events do occur. This means lobbying for rules, or litigating for doctrines, that read policy coverage narrowly, read exclusions broadly, and allow insurers broad discretion in crafting lawyerly policies.

Insurers also seek the right to refuse to insure high-risk insureds to reduce the chance of adverse selection. Sometimes, refusals to insure can be socially beneficial. For example, when an auto insurer refuses to insure a driver with a dubious safety record or when a homeowner's insurance company refuses to insure a home in a disaster-prone region, the refusal might result in the would-be insured foregoing what would have been a risky activity. Yet refusals to insure are only socially useful when it is

154. *See generally* Ian Ayres & Steven D. Levitt, *Measuring Positive Externalities from Unobservable Victim Precaution: An Empirical Analysis of Lojack*, 113 Q.J. ECON. 43 (1998) (providing empirical evidence of externalities resulting from the use of LoJack).

155. *See id.* at 73. *See also* Ben-Shahar & Logue, *supra* note 146, at 212.

156. *See* Kneuper & Yandle, *supra* note 149, at 111–14.

157. *See id.* at 107.

158. *See* Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

159. *See* Kneuper & Yandle, *supra* note 149, at 111–12.

possible for the consumer to avoid the activity that causes the risk. With life and health insurance, that is often not the case. Insureds can sometimes stop smoking, but they cannot do anything about certain medical conditions. One central reform of the Affordable Care Act (ACA) was to prevent health insurers from denying coverage for "pre-existing conditions."[160] The health insurance industry only agreed to this regulation in exchange for receiving a group of new, low risk customers—healthy young people who might not have purchased health insurance policies until the individual mandate required them to do so.[161]

For these reasons, simply subsidizing insurers to give them more lobbying power is ill advised. They are as likely to use that power to loosen the rules preventing them from denying claims or refusing to insure as they are to use that power to advance risk regulation. Even within the context of risk regulation, insurers will oppose legislation that would totally eliminate an insurable risk or at least prohibit the behavior that would create that risk, although it is difficult to imagine practical examples where this incentive would be relevant, other than the possibility of autonomous vehicles effectively eliminating auto collisions.

D. Prescriptions

Changing insurers' political agenda requires changing who purchases insurance coverage and what it covers. The more insureds engage in or are exposed to a particular risk, the more an insurer will internalize the benefits of reducing that risk. There are generally four ways that regulation can broaden coverage: it can make insurance cheaper for all consumers by subsidy; it can make insurance cheaper for a class of consumers by prohibiting insurers from discriminating against members of that class; it can make insurance available to the previously uninsurable by prohibiting insurers from refusing to insure them; and, most dramatically, it can mandate insurance coverage.

When the state subsidizes insurance, it enriches insurers, which could directly increase their interest group power; however, the main political effect of a subsidy is indirect. Because more consumers will purchase insurance at the discounted price, insurers will stand to profit more from regulations that reduce their insureds' risk, so they will be more likely, on the margin, to lobby for them. In some cases, a subsidy could have desirable distributive effects. As a subsidy enables consumers with lower

160. The provisions relating to pre-existing conditions can be found in 42 U.S.C. § 18,001 (2012).

161. The individual mandate is codified at 26 U.S.C. § 5000A (2012).

incomes to afford insurance, insurers would have an incentive to reduce risks that impact lower income groups.

The same political effects can be achieved through prohibiting insurers from discriminating against members of a class or refusing to insure them entirely.[162] One difference between these types of regulations is who pays for the new coverage. A subsidy spreads the cost out over all taxpayers. A ban on a type of discrimination or on certain refusals spreads out the cost on other insureds. But the latter two policies have the benefit of guaranteeing that a particular class will be covered. If these policies are not designed carefully, however, they could push insurers out of the market or raise prices on other insureds to the point where they no longer purchase insurance.

An insurance mandate differs from the other three types of regulation in that it targets consumers rather than insurers. It acts as a subsidy to insurers by providing them with a new set of customers. One might think that insurers would always welcome insurance mandates for that reason, but the auto insurance industry actually fought state auto insurance mandates for decades, in part because they predicted that being forced to cover high-risk drivers would reduce their net profits.[163] Contrast that example with ACA, where insurers accepted the requirement to cover "pre-existing conditions" in exchange for the mandate. Thus, unlike the examples of differentially risk-creating and risk-mitigating firms discussed above, insurers might actually lobby against the very legal changes that will give them the incentive to lobby for public-interested risk regulation.

The main benefit of using regulation expanding insurance coverage as a means for building support for public-interested regulation is that it is an especially stealthy, long-term strategy. The relevant risk-creating industry might not appreciate that insurers will have interests adverse to them, and, therefore, they might not invest in opposing the expansion. In fact, for some activities, the risk-creating industry might even support an insurance mandate because the existence of an insurance market might make a risky activity seem safer to outsiders. In contracting, for example, an insurance requirement might improve the contracting industry's reputation by compelling the risky subset of contractors who would not purchase insurance in the absence of a mandate to comply with insurers' requirements or leave the market.

162. Laws prohibiting insurers from discriminating based on certain kinds of class membership vary considerably among the states. *See* Ronen Avraham et al., *Understanding Insurance Antidiscrimination Laws*, 87 S. CAL. L. REV. 195, 235–66 (2014).

163. *See* Jennifer B. Wriggins, *Mandates, Markets, and Risk: Auto Insurance and the Affordable Care Act*, 19 CONN. INS. L.J. 275, 311 (2013).

Expanding insurance coverage to a new market might also create the possibility for interest group alliances with other firms, like differentially risk-creating and risk-mitigating firms. The LoJack example is instructive. The risk-mitigating firm on its own did not have the clout to get state insurance commissioners to create discounts for its products, but insurers provided the lobbying power. It is probably not a coincidence that this alliance formed in the auto insurance market, a market where insurers benefit from a mandate.

One important advantage of using insurers as an interest group to advance risk regulation is that there is a separation between the agencies that regulate insurance and the agencies that regulate risk in which insurers might have an interest. Insurers are regulated through state insurance commissions,[164] but most risk regulation occurs in federal administrative agencies. This separation has two beneficial effects.

First, because regulation expanding insurance coverage will be enacted in state legislatures or promulgated by state insurance commissions, it might remain below the political radar. The risk-creating firms that might have an interest in opposing it may be focused on federal risk regulation agencies and Congress and might not monitor events in state insurance law. At a minimum, they will not be repeat players in those arenas.

Second, to the extent that subsidizing insurers will increase their socially wasteful rent-seeking behavior, that behavior will be targeted at different agencies than their socially beneficial rent-seeking. Therefore, if state insurance commissions can be fortified against the influence of insurer lobbying, subsidies to insurers that are used for political purposes may be directed toward public-interested regulation.

V. LAWYERS

A. Theory

Law firms resemble conventional business firms in their political activity. They form industry associations, hire lobbyists, and attempt to influence legislation and regulation. As public choice theory predicts, some of the

164. For a description of how state insurance commissions work and an analysis of the reasons for why regulation is left to the states, see generally Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U. L. REV. 625 (1999). Congress has codified a declaration that "the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011 (2012).

most influential lawyer organizations are concentrated ones: groups that represent some small segment of the bar with cohesive interests. For risk regulation, there are two important sets of lawyer interests. The first is the plaintiffs' bar, which sometimes lobbies and litigates for more aggressive private law risk regulation through the tort system.[165] The second is the set of lawyers who represent individuals in suits based on the many causes of action that risk regulation statutes create.

This Article so far has focused on public law risk regulation—the health, safety, and environmental statutes that legislatures pass and the rules that administrative agencies promulgate to implement them. The mechanism of lobbying for changes in this area of risk regulation is the familiar strategy of influencing legislators and regulators. But much of risk regulation comes through the deterrent effect of state tort law. Some of the political activity that influences the development of state common law comes through impact litigation, rather than lobbying. Interest groups can influence doctrinal changes by bringing test cases in state appellate courts.

Lawyer interest groups are especially effective at these strategies. The service they market—advocacy—is the same service that they need to advance their political agenda, which makes them savvy consumers of political activity. As its members appear in court repeatedly to represent the same interests, the plaintiffs' bar has some repeat player advantages.[166] Litigation that has the potential to shift doctrine can be an unintended byproduct of lawyers' regular business, and the individual members of a lawyer interest group may have an unusually strong stake in the outcome because their clients' interest aligns with the interest of the organization.

The plaintiffs' bar can also affect the development of state common law by influencing the judicial selection process. In states with judicial elections, this will mean contributing to judicial election or retention campaigns.[167] In other states, lawyer organizations partially control the selection process directly, and thus the plaintiffs' bar can influence who is

165. For a history of the organization of the plaintiffs' bar, see John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 263–71 (2007). For an account of the plaintiffs' bar's role in more recent tort reform battles, see Anthony J. Sebok, *Dispatches from the Tort Wars*, 85 TEX. L. REV. 1465, 1502–04 (2007) (book review).

166. *But see* Galanter, *supra* note 6, at 118 (reasoning that a specialized plaintiffs' bar "should overcome the gap in expertise, allow some economies of scale, provide for bargaining commitment and personal familiarity. But this is short of overcoming the fundamental strategic advantages of [repeat players]—their capacity to structure the transaction, play the odds, and influence rule-development and enforcement policy.").

167. On the role of the bar in judicial elections, see generally Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391 (2001).

named to the bench by joining selection committees.[168]

Sometimes the development of state tort law can be influenced through lobbying as well. The tort reform movement has led to a rise in damage caps and other statutory limits on liability,[169] and the plaintiffs' bar has fought back.[170] The outcome of the political struggle over these statutes hinges on who has influence in state legislatures. Congress also has the potential to affect state tort law through preemption. Legislative efforts to limit state tort law have also spilled back into litigation. The plaintiffs' bar has relied in part on constitutional challenges to invalidate tort reform statutes.[171]

In tort law risk regulation, the plaintiffs' bar has an interest in broad liability, unlimited damages,[172] and unlimited attorneys' fees. It should be obvious that some of these incentives are potentially socially wasteful. But they can be socially useful. At least in theory, tort law causes risk-creating firms to internalize the costs of their activities. Because of the time and expense involved, a lack of legal sophistication, or fatalism, many plaintiffs would not bring meritorious suits in the absence of an aggressive plaintiffs' bar, which would undermine tort law's socially useful deterrent effect.

It is conceivable that, because lawyer interest groups have special political advantages in litigation rather than lobbying or among judges rather than legislators, they have a relative advantage over risk-creating firms in influencing private law risk regulation. If that is true, private law risk regulation might serve as a failsafe when risk-creating firms are able to

168. Many states select judges through a process known as "the Missouri Plan," in which lawyers' or state bar associations are heavily represented on the selection commission. For an authoritative summary of state judicial selection methods, see AM. JUDICATURE SOC'Y, JUDICIAL MERIT SELECTION: CURRENT STATUS (2011), *available at* http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf.

169. For an authoritative list of statutory reforms to tort law, see Ronen Avraham, *Database of State Tort Law Reforms (5th)* (Univ. of Tex. Sch. of Law, Working Paper No. e555, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902711.

170. *See* Sebok, *supra* note 165, at 1502–04 (describing the response of the plaintiffs' bar to the tort reform movement).

171. History reveals that the plaintiff's bar is not unique in using this strategy. *See* John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1196 (2005) ("At different times and in different places, virtually all of the contending interest groups in the American tort debates have found themselves advancing constitutional arguments against amendments to the existing law of torts.").

172. But note that the plaintiffs' bar has some conflicting interests that cut against more aggressive lobbying to address the main obstacle to damages payouts: judgment-proof defendants. *See* Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 707–09 (2006).

capture public regulatory agencies.

A different set of lawyers has an interest in public law risk regulation. There are a large number of private rights of action in public law, both created by statute and implied by judicial decisions.[173] For example, almost every major federal environmental statute passed since the 1970s contains a "citizen suit" clause.[174] Scholars have distinguished between "agency-forcing" and "enforcing" suits.[175] In an agency-forcing suit, the plaintiff "su[es] the government agency charged with implementing the environmental laws . . . alleg[ing] that an agency has failed in its duties to fulfill the mandates" of a statute.[176] In an enforcing suit, the plaintiff "typically sues a private corporation that is allegedly violating environmental laws or regulations . . . thus enforc[ing] the law, when the government has been unable or unwilling to do so."[177]

Agency-forcing suits are unlikely to sustain a political economy because they are so rare.[178] Enforcing suits are not rare, and they can be self-sustaining if attorneys' fees are large and predictable enough that lawyers have an interest in filing them. They can be socially wasteful, but they can also serve important regulatory goals. One of the standard justifications for private rights of action is that private litigants will intervene where agencies fail to enforce their statutory aims—sometimes because of pressure from regulated industry.[179]

B. Empirical Plausibility

The organized plaintiffs' bar in the United States has a surprising origin story. It is descended from lawyers working in a system we now see as the alternative to tort law: worker's compensation.[180] In the 1940s, "employers'-side lobbies sought to reduce benefit levels, which in turn reduced the fees that claimants' lawyers received from their clients in

173. For examples, see Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 98–106 (2005) [hereinafter Stephenson, *Private Enforcement*].

174. *Id.* at 99.

175. Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L. & TECH. J. 55, 55 (1989); *see also* Stephenson, *Private Enforcement*, *supra* note 173, at 97 (following this distinction).

176. Cross, *supra* note 175, at 55.

177. *Id.*

178. *See id.* at 56 (stating that the "overwhelming majority" of citizen suits are enforcing suits).

179. *See* Stephenson, *Private Enforcement*, *supra* note 173, at 110.

180. *See* Witt, *supra* note 165, at 264–65.

compensation cases."[181] To protect their business model, "a small group of claimants'-side workers' compensation lawyers formed an organization called the National Association of Claimants' Compensation Attorneys (NACCA)," which "fought in the legislature and the state agencies for benefit rates and other changes in the workers' compensation system."[182]

The compensation claimants' bar's embrace of the tort system was due in part to its susceptibility to interest group politics:

> Within just a few short years, however, NACCA leaders realized that the lobbying and networking they were learning to do in their workers' compensation practices could be adapted to tort, where it would be considerably more lucrative. Notwithstanding its common-law roots, legislatures had considerable influence over the law of torts. Moreover, courts were subject to the kinds of interest group politics in which the NACCA leadership was beginning to participate, especially at the state level.[183]

In 1964, NACCA became the Association of Trial Lawyers of America (ATLA), now known as the American Association for Justice (AAJ).[184] The AAJ is one of the largest donors to state and federal political campaigns.[185] It is one of the leading opponents of legislation to cap tort damages and scale back tort liability.[186] It is also active in state judicial election campaigns.[187]

No particular legislative intervention bolstered the interest group power of the plaintiffs' bar. Rather, the creation of an organized plaintiffs' bar was a byproduct of interest group struggles over the workers' compensation system. But this history supports the general point that the financial interests of lawyers, and their capacity for organization, can be a powerful political force for expanding or sustaining risk regulation.

There is at least an arguable example of a legislation-created lawyer interest group in environmental law. Todd Zywicki claims that the Environmental Protection Agency's (EPA's) Superfund program, which

181. *Id.* at 264.

182. *Id.*

183. *Id.*

184. *Id.* at 265.

185. According to the Center for Responsive Politics, the American Association for Justice (AAJ) was the 16th largest institutional donor to candidates, parties, and political action campaigns between 1989 and 2014, donating over $48 million, ranked between Goldman Sachs and Contran Corp. CTR. FOR RESPONSIVE POL., *Top Organization Contributors* (Mar. 9, 2015), https://www.opensecrets.org/orgs/list.php.

186. *See* Sebok, *supra* note 165, at 1502–04; *see also* F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 480–83 (2006).

187. *See* Champagne, *supra* note 167, at 1394–96.

allows the EPA to sue defendants for the cost of cleaning up hazardous waste sites and then allows those defendants to sue others for reimbursement, has largely become a vehicle for the interests of the hazardous waste industry and its lawyers.[188] He notes that lawyers' groups supported its enactment and subsequent expansion and cites evidence that contributions of "trial lawyers" to members of Congress significantly predicted members' votes for expanding the program.[189] Zywicki thinks the Superfund program is socially wasteful, but one need not share his evaluation of the program to accept his account of its political economy: lawyer interest groups helped create and sustain an environmental program that is costly to entrenched interest groups.

C. Conflicting Interests

It may be helpful to distinguish between three different types of divergence between a lawyer's interests and the public interest. The first is the divergence between a lawyer's interest and her client's interest in a particular case. The second is the divergence between a lawyer's interest and her client's interest at the level of the dispute resolution system. The third is the divergence between her client's interest and the social interest. Both create potential obstacles to a virtuous capture strategy based on empowering lawyer interest groups, but the latter two are more significant.

The divergence between a lawyer's interest and her client's interest is more familiar and, at least presumptively, more amenable to regulation. Relative to their clients, lawyers might have a greater interest in quick settlements (if on a contingency fee basis) or on protracted litigation (if on a billable hour basis).[190] They might prioritize net financial recovery—and thus greater net fees—at the expense of other goods, such as having a day in court, avoiding the disclosure of private information, or preserving business relationships. But as significant as these conflicts can be, they are widely appreciated and heavily regulated by professional responsibility rules that are drafted, enacted, and enforced by the legal profession.

From a public choice perspective, it may be difficult to explain why the legal profession, given that it largely self-regulates, has chosen to protect the interests of the clients rather than just the interests of its members beyond what the need to protect the public reputation of the profession requires. A public choice theorist might question whether the practice of professional

188. *See* Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845, 858–60 (1999).

189. *See id.* at 904.

190. The incentives that lawyer referral networks create may mitigate the misalignment of interests. *See* Witt, *supra* note 165, at 274–75.

responsibility regulation matches the client-first rhetoric of the codes. But the relevant point here is that, whatever the current level of policing of conflicts of interests between lawyers and clients, there is not any reason to predict that empowering lawyer interest groups would exacerbate the divergence between client interests and lawyer interests because lawyers already control the means to regulate that divergence.

Lawyer interests and client interests diverge more dramatically at the level of the system of dispute resolution. One would expect clients to prefer a system that minimizes costs and expedites recovery and expect lawyers to prefer the opposite. Sure enough, the plaintiffs' bar aggressively fought one of the most prominent recent efforts to make the tort system more efficient: no-fault auto insurance plans.[191] Nora Freeman Engstrom explains, "The plaintiffs' bar bitterly and steadfastly opposed no-fault from the start—in part, no doubt, because the legislation would wipe out some substantial portion of plaintiffs' lawyers' livelihoods."[192] A former ATLA president "acknowledge[ed] that lawyers' staunch opposition to [no-fault] plans stemmed, in part, from the fact that they 'did not relish the prospect of losing 75 percent of their business in one fell swoop.'"[193]

Engstrom thinks that the "trials-lawyers-killed-it accounts" of the waning of no-fault plans is too simple, but she concedes that it gets "much right."[194] The more general worry it suggests is significant. Lawyer interest groups have a general interest in complicated, expensive, and lucrative systems of dispute resolution, and any virtuous capture strategy designed to empower lawyers must address that conflicting interest.

Finally, in some instances, clients and lawyers might have a shared interest that diverges with the public interest. Clients and lawyers will have a financial interest in cases based on technical violations of statutory provisions or common law innovations that do not cause firms to internalize genuine externalities and do not achieve just distributive transfers. There is no simple way to fund lawyer interest groups with the condition that they only lobby for justified expansions of liability.

D. Prescriptions

Whether empowering lawyer interest groups is justified as a political strategy is a highly case-specific question, and at least three factors are

191. *See* Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise"*, 61 DEPAUL L. REV. 303, 323–25 (2012).

192. *Id.* at 323.

193. *Id.*

194. *See id.* at 309.

relevant. First, if the strategy involves empowering a lawyer interest group that routinely litigates against parties that are themselves powerful interest groups, it is reasonable to worry less that they will be unable to counteract lawyer rent-seeking that comes at their expense. This factor weighs in favor of empowering specialized segments of the bar—perhaps subsets of the plaintiffs' bar or firms representing citizens in enforcing suits—rather than broader lawyer interest groups that oppose a diverse set of parties in court. Of course, as the Superfund example demonstrates, it is important to consider whether litigation that appears like individual plaintiffs versus corporate defendants is actually litigation between two different sets of powerful commercial interests.

Second, counter intuitively, empowering lawyer interest groups that litigate against the government may be a dubious strategy. Government actors do not internalize economic costs as private firms do.[195] An agency head does not pay damages out of the agency's budget the way a corporate executive might. Instead, governments respond to political costs, and paying out damages to lawyers and their clients might be a political benefit, not a cost, if the agency is captured. For the government check on abuse to work, a lawsuit might need to threaten a *reputational* cost on a government actor with discretionary power.[196]

Third, more speculatively, juries might be a check on unjustified lawyer rent-seeking. Even if lawyer interest groups are able to persuade legislators to pass socially wasteful legislation and able to defend it from attack in appellate courts, they may not be able to procure damages verdicts from lay jurors. The jury system certainly has its flaws, but jurors are the rare political actors that are insusceptible to pecuniary influence. When damages are left to a jury rather than proscribed by statute, the jury's common sense aversion to rent-seeking can check against liability for mere technical violations.

VI. CAPTURE CAN BE VIRTUOUS

Parts III–V argued that using interest groups to pursue regulatory goals is feasible. This Part argues that it can be justified. I make two claims. First, on plausible assumptions, deliberately increasing the influence of certain interest groups so that they will seek regulation for self-interested reasons will sometimes be socially utile—to reduce externalities, to improve distributional outcomes, and to counteract existing rent-seeking by other

195. *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 354–56 (2000).

196. Of course, there may be a divergence between the incentives of bureaucrats and legislators here. *See id.* at 380–87.

firms. Second, when a particular regulatory policy is normatively desirable, manipulating the power and incentives of interest groups is a legitimate means to achieve that policy.

A. Justified Ends

Part I explained that, according to public choice theory, firms will use their interest group power to seek economic rents, payments in excess of the market value of an asset.[197] According to one prominent definition, "rent seeking is the socially costly pursuit of wealth transfers."[198] This definition is potentially misleading. It is possible that, although a firm seeks regulation to acquire economic rents, the regulation could be socially utile, notwithstanding the firm's costly efforts to procure it. This possibility is underappreciated because "nearly all the public choice literature focuses on [the] negative consequences of rent seeking."[199]

There are at least three cases that a regulation for which a firm sought rents will increase social utility.[200] First, the regulation might increase efficiency by compelling other firms to internalize costs that they externalize in an unregulated market. Second, the regulation might improve distributional outcomes because of the diminishing marginal utility of wealth. Third, the regulation might counteract previously existing rent-seeking of a greater magnitude.

1. Reducing Negative Externalities

Firms' rent-seeking interests might be aligned with reducing negative externalities. Consider the following stylized hypothetical. Suppose that a set of firms was creating a significant externality—say, by emitting large quantities of carbon into the atmosphere, altering the climate, and ultimately imposing significant costs on others who have not accepted those costs in a bargain with the firms. Even the staunchest free market enthusiast would acknowledge that, if the facts were as described, regulation forcing the firms to internalize those costs would result in a net social benefit, especially in the form of a Pigouvian tax.

Now suppose further that a second set of firms had a strong profit-

197. *See* MUELLER, *supra* note 2, at 333–35.

198. Robert D. Tollison, *Rent Seeking*, *in* PERSPECTIVES ON PUBLIC CHOICE 506, 506 (Dennis C. Mueller ed., 1997). This definition is, for example, quoted in Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 228 (2012).

199. Cowen et al., *supra* note 17, at 131.

200. For a similar argument that rent-seeking is not always socially wasteful, see FARBER & FRICKEY, *supra* note 14, at 34–35.

seeking interest in that same regulation—clean energy firms, for example. Their reason for supporting the regulation was not that it was socially beneficial. Rather, they sought a private benefit: a competitive advantage over the firms creating the externality. Suppose this second set of firms lobbied for the regulation and succeeded in achieving it.

This is classic rent-seeking. Under a carbon tax, clean energy plants will receive payments in excess of their market value. The clean energy firms are using the coercive power of the state to increase their wealth, and they have engaged in costly lobbying to acquire that private benefit and likely compelled others to engage in costly lobbying to—unsuccessfully—oppose them. But, at least on these stylized facts, there will be a net increase in social utility, as the social benefit of the new regulation would overwhelm the social cost of the lobbying on both sides.

The result may still hold if the assumptions are relaxed. Suppose, for example, the regulation that the firms seek is not a carbon tax, but a less efficient clean energy regulation. Suppose further that the only reason that the firms are in the position to seek those policies was an earlier, less efficient clean energy subsidy. These additional inefficiencies undoubtedly reduce social utility compared to a pure carbon tax achieved without an earlier subsidy. But a world with an inefficient subsidy leading to lobbying, which in turn leads to an inefficient regulation that causes risk-creating firms to internalize some of the costs of carbon emissions, is still plausibly better off than a world in which the costs of emissions are externalized.

Relaxing these assumptions suggests that virtuous capture will be infrequent, not implausible. The stakes of the regulation need to be sufficiently high to justify the costly way in which it will be achieved and the inefficiencies that the imperfect alignment between the interests group's aims and the public's interests will cause. But when a regulation compels firms to internalize significant social costs, the regulation does not become socially disutile simply because it also confers economic rents on other firms.

2. Achieving a Fairer Distribution

Regulations that appear inefficient if utility is equated to dollars may be nonetheless socially utile because of the diminishing marginal utility of income.[201] It is standard in the law and economics literature to assume that

201. *See, e.g.*, Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 991 (2001) ("Redistributing income from the rich to the poor will tend to raise social welfare, assuming that the marginal utility of income is greater for the poor than for the rich."). *But see* Sarah B. Lawsky, *On the Edge: Declining Marginal Utility and Tax Policy*, 95 MINN. L. REV. 904 (2011) (questioning the diminishing marginal utility of income).

the distributional effects of regulation can be ignored because, once the efficient rule is determined, any adverse distributional effects can be corrected by a transfer through the tax system.[202] The assumption is justified on the well-supported ground that the tax system is a more efficient means to transfer wealth than legal rules are.[203]

This assumption is extremely useful for the purpose of economic analysis. It simplifies what would otherwise be prohibitively complicated questions about the utility effects of different legal rules. But the assumption is less useful for political analysis. There is no reason to expect that, once a legal rule is changed to become more efficient, its adverse distributional effects will be offset through tax transfers. The assumption that distributional effects can be ignored bleeds into some public choice analyses. It is sometimes assumed that if a regulation creates inefficiency in dollars, it creates a disutility. However, if there is a diminishing marginal utility to income, that assumption is deeply misguided.

I emphasize the diminishing marginal utility of income argument because it is internal to the welfarist analysis. But welfarism is not self-evidently the best theory of the good. It is plausible that the best normative position is not welfarism, but prioritarianism. In the words of its leading proponent in the legal academy, "while utilitarianism simply adds up individual utilities, prioritarianism gives extra moral weight to well-being changes affecting individuals at lower well-being levels."[204] That debate is beyond the scope of this Article.[205] Welfarism and prioritarianism converge on the view that distributional effects matter; they diverge only on how much they matter and why.

Consider a second hypothetical. Imagine that firms are disposing of toxic waste next to a low-income neighborhood, creating risks to its residents' health and the nearby environment. Because the residents of the neighborhood lack political clout, they are unable to convince the relevant legislators to act. Now suppose that a group of enterprising lawyers convinces the legislature to enact a statute that creates a cause of action for individuals who have been exposed to toxic waste near their residence. Then the lawyers, for profit-seeking reasons, approach the residents and enlist them as plaintiffs. They sue the risk-creating firms and settle.

It is easy to see how this sort of rent-seeking might be inefficient. The plaintiffs' bar would spend funds lobbying for the law, and the risk-creating

202. *See* Kaplow & Shavell, *supra* note 201, at 993–94.

203. For standard citations, see *id.* at 994 & n.65.

204. Matthew D. Adler, *Future Generations: A Prioritarian View*, 77 GEO. WASH. L. REV. 1478, 1484 (2009).

205. For a brief argument aimed at motivating prioritarianism, see *id.* at 1486–87.

firms would spend to oppose it. The litigation process itself would be expensive, and a third of the damages would go to the lawyers. The cause of action might not be narrowly tailored to remedying the injury. The statute might not be limited to justified causes of action.

But the rent-seeking might be justified if it compelled the firms to internalize the costs they externalized onto the neighborhood. More subtly, this type of legislation and litigation could have distributive effects on future decisions about where toxic wastes should be disposed. If lawyer rent-seeking can help compensate for the political deficit that low income communities face, firms would no longer have an incentive to locate risk-creating facilities in low income neighborhoods.

The hypothetical is not wholly fictional. There have been a series of lawsuits brought by lawyers affiliated with the environmental justice movement aimed at redressing environmental harms concentrated on racial minorities using the Civil Rights Act of 1964.[206] The primary motivation behind these early, risky lawsuits was most likely the lawyers' vision of social justice rather than rent-seeking. But there is no obvious reason why pecuniary motives, or some combination of motives, could not serve the same purpose.

There is good reason to expect that some rent-seeking might be necessary to protect low income citizens from externalized risk. Political scientists have amassed voluminous evidence that the political process is more responsive to the preferences of affluent voters,[207] but the more vivid reason is historical. For much of the last century, the unique organizational strengths of private sector unions gave their members more political power than groups of low-income individuals usually have. Unions behaved much like firm interest groups did. They sought legislation and regulation to protect their members, like subsidies and barriers to entry.[208] Many

206. *See* Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?*, 27 B.C. ENVTL. AFF. L. REV. 631, 632 (2000). *But see* Nicholas C. Christiansen, Comment, *Environmental Justice: Deciphering the Maze of a Private Right of Action*, 81 MISS. L.J. 843, 849–51 (2012) (finding that environmental justice litigation using the Equal Protection Doctrine historically has largely failed because of high burden of proving invidious racial discrimination in facially-neutral statues and regulations).

207. *See e.g.*, Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OPINION Q. 778 (2005).

208. *See, e.g.*, Donald J. Kochan, *Corporate Social Responsibility in a Remedy-Seeking Society: A Public Choice Perspective*, 17 CHAP. L. REV. 413, 445 (2014) ("Public interest-labeled groups . . . seek to maximize their budgets, maximize influence, maximize membership, secure their jobs, and in the case of corporate social responsibility sometimes directly effectuate wealth transfers into their organizations or constituencies . . . ."); Kochan mentions "unions" as one of the "public interest-labeled groups" he has in mind. *Id.* at 443. I do not share Kochan's distaste for certain nonprofits, but I accept his positive account.

currently existing occupational health and safety regulations are the result of union lobbying.[209]

Some politicians deliberately employed and some activists and scholars openly defended something like a virtuous capture strategy with unions. They sought changes in the law designed to increase the power of unions, based on the expectation that more powerful unions would lead to legislation favorable to worker interests, including more aggressive regulation of worker health or safety.[210] It is possible that other interest groups, like differentially risk-creating firms, risk-mitigating firms, insurers, and lawyers, can be given the right incentives to fill part of the political economy vacuum that the decline of private sector unions has created.

3. Counteracting Existing Rent-Seeking

Public choice theory suggests a third justification for new rent-seeking—counterbalancing existing, more inefficient rent-seeking. Take barriers to entry for example. Suppose that incumbent firms have procured a regulation that pays them rents by restricting potential new entrants. The social costs of that rent-seeking are the incumbent's lobbying expenditures and the inefficiency that the regulation creates by making the market less than perfectly competitive. Now suppose that, due to a subsidy, a coalition of potential new entrants has grown in political power. The new entrants start their own lobbying to dislodge the entry barrier. The incumbents fight back, but the potential new entrants prevail.

There is a lot of socially wasteful spending in this hypothetical. First, there was the cost of lobbying for the initial subsidy, and the subsidy itself may have also been inefficient because there is no reason to assume that the level of subsidy needed to achieve the interest groups' effects equals the

209. *See, e.g.*, James T. O'Reilly, *Driving a Soft Bargain: Unions, Toxic Materials, and Right to Know Legislation*, 9 HARV. ENVTL. L. REV. 307, 307 (1985) (noting that unions successfully lobbied for state right to know laws concerning toxic materials in the workplace, as well as the Occupational Safety and Health Administration's (OSHA's) Hazard Communication standard); Benjamin Goad, *Unions Applaud as OSHA Releases Long-Stalled Worker Safety Rule*, THE HILL (Aug. 23, 2013, 6:28 PM), http://thehill.com/regulation/labor/318543-osha-releases-long-stalled-worker-safety-rule. *See generally* Andrew P. Morriss & Susan E. Dudley, *Defining What to Regulate: Silica and the Problem of Regulatory Categorization*, 58 ADMIN. L. REV. 269 (2006) (detailing health effects of silica exposure, options for regulation, and the history of advocacy for occupational health standards).

210. *See, e.g.*, Beverly Gage, *Should You Care About the Fate of Unions?*, SLATE (June 30, 2014, 6:08 PM), http://www.slate.com/articles/news_and_politics/history/2014/06/supreme_court_harris_decision_if_you_care_about_income_inequality_you_should.html; Richard D. Kahlenberg & Moshe Z. Marvit, *A Civil Right to Unionize*, N.Y. TIMES (Feb. 29, 2012), http://www.nytimes.com/2012/03/01/opinion/a-civil-right-to-unionize.html.

socially optimal level ignoring interest group effects. To this sum should be added the cost of the new entrants' lobbying efforts and the cost of incumbents to oppose them. This could be an expensive political arms race.[211]

But it still might have a positive expected value as a whole. If the existing barriers to entry are strongly curbing competition, removing the barriers could be enormously valuable. If the new entrants win decisively and establish a new equilibrium in the political economy, the long-term efficiency gains of the competitive market could outweigh the one-time cost of the lobbying. Of course, there is a chance that the new entrants will be so successful that they will be able to establish new barriers to entry that are tailored to include them yet exclude the next generation of potential entrants. But, in the short run, it is difficult to imagine a political coalition that is powerful enough to outbid incumbents but selective enough to exclude other potential new entrants.

B. Justified Means

One could object that, even if the ends of virtuous capture can be justified, it is not a normatively permissible means to achieve those ends. There are three plausible arguments for why it is an impermissible means. First, the strategy defended here might be unjustified because it uses interest groups as a means to an end other than their own. Second, it might be illegitimate to deliberately manipulate the outcomes of democratic processes. Third, the strategy might be objectionable because in some cases it relies on deception and fails a test of public reason.

1. Autonomy

This Article has defended using interest groups as a means to an end—the end of achieving public-interested health, safety, and environmental regulation. At first glance, the strategy might appear to violate the widely shared moral intuition that no person should be used as a means. That intuition is famously at the center of Kantian ethical theory. But one need not be a Kantian to accept the claim that there should be some side constraints on political action and that respecting the autonomy of persons is an intuitively compelling side constraint. The Article has defended both

211. *See* Justin Levitt, *Confronting the Impact of* Citizens United, 29 YALE L. & POL'Y REV. 217, 218–19 (2010) (crediting creation of campaign spending arms race as a result of *Buckley v. Valeo*, 424 U.S. 1 (1976)); Burton A. Abrams & Russell F. Settle, *Campaign-Finance Reform: A Public Choice Perspective*, 120 PUB. CHOICE 379, 379 (2004) (comparing campaign spending to an arms race).

empowering and altering the incentives of interest groups. These acts may seem similar, but for the autonomy objection, they need separate defenses.

When the strategy calls for empowering interest groups through subsidy, the autonomy objection is easily defeated. One can distinguish between using an agent as a means and using an agent as a mere means.[212] In almost every commercial transaction, there is a literal sense in which we use the person with whom we are doing business as a means to our end. Riding in a taxi to the airport entails using the driver as a means to the end of the voyage, but it does not entail using the driver as a mere means. The driver consents to the transaction because it serves his or her purposes—making a living—as well. Riding in the taxi does not disrespect the driver's rational agency.[213] Likewise, the strategy of empowering interest groups through subsidy *assumes* that those groups already have their own profit-seeking reasons to lobby for the regulation. The interest groups would gladly consent to receive additional funding from outsiders with different interests in the same regulatory goals.

When the strategy calls for altering the incentives of interest groups, the ethical analysis is more complicated. Take, for example, the argument in Part IV that in some cases legislation should require insurance mandates so that insurers develop the incentive to lobby for regulation that reduces the risks of insureds. Insurers might—if history is a guide—lobby against the insurance mandate. In that case, at least before the mandate is enacted, the interest groups will not have consented to being used to pursue the regulatory goals that they will come to pursue after the mandate goes into effect.

The better response to the objection here is that most commercial interest groups—certainly the firms discussed here—are not "persons" in the sense that matters ethically. Individual persons—lobbyists, managers, corporate boards—make decisions on behalf of their interest groups, but they make those decisions, to the extent that the firms' incentives work as they are intended, based on what is in the profit interest of the firm. Were it not for their employment by the firm, the individual persons making the firms' decisions would almost always be indifferent to the outcome of those decisions. Of course, because the firm pays their salary, they probably would prefer that the firm be profitable, so they would likely disapprove of the firm's incentives being altered if the new incentives led to less

212. To illustrate the distinction between using someone as means versus mere means, I rely on the common example of the interaction between a taxi rider and a taxi driver. For a different use of the same example, see B. Sharon Byrd & Joachim Hruschka, *Kant on "Why Must I Keep My Promise?"*, 81 CHI.-KENT L. REV. 47, 52–53 (2006).

213. *Id.* at 52.

profitability. But the preferences that lobbyists, managers, and corporate boards might have in that case would have nothing to do with a firm's autonomy.

This response may not apply to all commercial interest groups. Many for-profit firms claim to have a social mission in addition to their economic mission, and for some of these firms, the claim is more than a public relations strategy.[214] It is conceivable that the individual decisionmakers at these firms might actually care about the firm continuing to pursue its social mission and might be genuinely outraged that their interest group's incentives have been altered so that it is more difficult to fulfill this mission. But that scenario is extremely unlikely to occur as a result of a virtuous capture strategy, which, by definition, aims to align a firm's interest with—at least one conception of—the public interest.

The response would also certainly not apply to all interest groups. For many non-commercial interest groups, autonomy is a value worth protecting. Consider, for example, the interest group machinations that surrounded the New York City Health Department's ill-fated attempt to cap the portion sizes of certain sugary drinks.[215] The beverage industry, which opposed the cap, responded in part with an unconventional interest group strategy: they sought to portray the regulation on sugary drinks as having a disproportionate negative effect on minority groups. To make that argument, they enlisted the help of activist groups that represented minority communities and funded them generously.[216] Some have argued that the beverage industry effectively bribed or co-opted the minority groups.[217] Others have been skeptical that the groups were genuinely co-opted.[218] Both sides agree that the portion cap would have disproportionately affected minority consumers.[219]

214. *See generally* Jenny Mish & Debra L. Scammon, *Principle-Based Stakeholder Marketing: Insights from Private Triple-Bottom-Line Firms*, 29 J. PUB. POL. & MARKETING 12 (2010).

215. For a brief explanation of the proposed regulation, see *In re N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health & Mental Hygiene*, 16 N.E.3d 538, 541–42 (2014).

216. *See, e.g.*, Nancy Huehnergarth, *How Big Soda Co-opted the NAACP and Hispanic Federation*, HUFFINGTON POST (Jan. 25, 2013, 8:48 AM), http://www.huffingtonpost.com/nancy-huehnergarth/minorities-soda-lobby_b_2541121.html.

217. *See id.*

218. Rick Cohen, *Lessons from the NAACP's Public Opposition to New York City's Big Soda Ban*, NONPROFIT Q. (Mar. 21, 2013, 1:42 PM), https://nonprofitquarterly.org/policysocial-context/22000-lessons-from-the-naacp-s-public-opposition-to-new-york-city-s-big-soda-ban.html.

219. Michael M. Grynbaum & Marjorie Connelly, *60% in City Oppose Bloomberg's Soda Ban, Poll Finds*, N.Y. TIMES (Aug. 22, 2012), http://www.nytimes.com/2012/08/23/nyregion/most-new-yorkers-oppose-bloombergs-soda-ban.html?_r=0.

The normative analysis of these decisions is complex. It could be that the beverage industry's contributions to minority activist groups had no causal role in those groups' leader's decisions to oppose the portion cap. But at least one plausible interpretation of the situation suggests that the beverage industry sought to use minority interest groups to advance their regulatory agenda and that their strategy to achieve this goal was to fund the minority groups, so as to create an incentive for those groups to publicly oppose the portion size cap.

If that interpretation is accurate, the beverage industry's manipulation of minority interest groups might be an objectionable use of an interest group as a means to an end. The fact that the minority groups appeared to cooperate with the beverage industry voluntarily might not be a full defense, if they (1) only made the decision to oppose the cap because of the money and (2) we accept that this case is distinguishable from the case of the taxi driver, because the minority groups' public positions should not be transactional.

But this example reinforces why using interest groups is innocuous when the groups are for-profit firms, insurers, and lawyers. For-profit firms' public political positions are, almost by definition, transactional—taken to serve their profit-seeking interests. Thus, even deliberately altering the political incentives of these firms against their protest might be a normatively permissible means to achieve otherwise desirable ends.

2. Democratic Legitimacy

Virtuous capture might also be criticized from the perspective of political philosophy. Even if the strategy does not violate anyone's autonomy, it might violate the principles that we take to constrain legitimate political activity in a democracy. There are three plausible versions of this objection. First, one could object that legislators should never support legislation based on its political effects rather than on what makes good policy. Second, one could object that, even if legislators can legitimately consider political effects as part of what constituted "good policy," those political effects should not be based on financial incentives—what critics call legalized bribery. Third, one could object that, even if legislators can support legislation that will appeal to the financial interests of the majority, they should not support legislation because it will appeal to the financial interests of a powerful minority.

To be clear, any of these versions of this normative theory of democracy might seem like idealistic fantasies to a thoroughgoing public choice theorist. If all politicians act solely to maximize their chances of reelection, as public choice theory claims, any theory that requires them to have other motivations fails the maxim that "ought implies can." The democratic legitimacy objection only has some traction here because this Article rejects the radical version of public choice theory and defends a strategy that depends on the possibility that some political actors might have ideological motivations—that is, motivations based on their conception of the public interest. The democratic legitimacy objection comes from the opposite direction of radical public choice theory. It is an argument that politicians should be even more constrained in acting on those public-interested motivations than the Article recommends.

The vision of democracy that posits that legislators should support or oppose legislation based on whether it is good policy is intuitively appealing. There is a longstanding debate about whether legislators should be delegates—for whom "good policy" is defined by what the legislator's constituents think is good policy—or trustees—for whom "good policy" is defined by what the legislator herself thinks is good policy.[220] But the debate presumes that someone's sincere policy preferences, their conception of the public interest, should be decisive. Legislative compromises may be necessary, but legislators should only support compromises if the compromise is, on balance, an improvement from the status quo policy.

One challenge to this view is what it suggests about whether legislators should sometimes support legislation that they or their constituents believe to be bad policy, but that will help their reelection. If one concedes that voting for bad policies to increase one's electoral chances—and thereby enhancing one's ability to pursue good policies in the future—is acceptable, then it should not be objectionable to support legislation based on predictions about how that legislation will have good political effects other than one's own reelection that will lead to good policies in the future. But the objector could bite the bullet here and insist that increasing one's chances of reelection is not a permissible reason to support bad policy.

Then the only response available is to question whether political effects should never be part of a good policy. There is no knockdown normative argument for the view that good political effects should be considered part of good policy. But there are at least some examples of widely admired policies from history that were designed in part to have political effects.

220. For a modern expansion of the delegate and trustee theories of representation, see Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 AM. POL. SCI. REV. 214 (2009) (describing a "typical" pure delegate or pure trustee legislator and establishing eight possible variants of delegates or trustees by determining their aims, sources from which they draw to make decisions, and responsiveness to sanctions such as re-election).

The most high-profile examples are Social Security and Medicare.[221] One standard policy justification for these programs is their distributive effect.[222] They provide, respectively, income support and health insurance to the elderly, who may be unable to rely on market employment. Both of these programs probably could be made more efficient by introducing some means-testing. There is no good "policy" rationale for transferring money to wealthy seniors, who can use their assets or savings for income and to pay for health insurance.

Yet, means-testing would undermine the political economy of Social Security and Medicare. They are two of the most popular government programs,[223] and few politicians from either mainstream party will openly suggest significant cuts to these programs, or at least cuts that would affect current beneficiaries.[224] The attractive political economy of these programs is not a coincidence. The architects of both programs knew that making every person over a certain age eligible for benefits would help to ensure a broad self-sustaining political constituency that included middle and high income individuals, opposing any future cuts.

This lesson is not lost on today's politicians. It is no coincidence that the two of the first provisions of the Affordable Care Act to come into effect were the prohibition on health insurers discriminating against those with pre-existing conditions and the requirement that children be allowed to remain on their parents' health insurance policies until twenty-six.[225] Much of the ACA is redistributive,[226] but these two provisions benefit middle- and high-income individuals and thus help cement political support for the ACA.[227]

221. *See, e.g.*, Patricia E. Dilley, *Through the Doughnut Hole: Reimagining the Social Security Contribution and Benefit Base Limit*, 62 ADMIN. L. REV. 367, 368, 381 & n.40 (2010).

222. *See, e.g.*, William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1448 (1986).

223. For example, in a 2011 poll, 88 percent of Americans stated that Medicare has been "good" or "very good" for the country, and 87 percent stated likewise for Social Security. *See* THE PEW RESEARCH CENTER, GOP DIVIDED OVER BENEFIT REDUCTIONS: PUBLIC WANTS CHANGES IN ENTITLEMENTS, NOT CHANGES IN BENEFITS 1 (June 7, 2011), *available at* http://www.people-press.org/files/legacy-pdf/7-7-11%20Entitlements%20Release.pdf.

224. *See* Benjamin A. Templin, *Social Security Reform: The Politics of the Payroll Tax*, 32 QUINNIPIAC L. REV. 1, 35–40 (2013).

225. 42 U.S.C. § 300gg-14 (2012).

226. *See* Lawrence R. Jacobs, *What Health Reform Teaches Us About American Politics*, 43 POL. SCI. & POL. 619, 619 (2010).

227. *See* Mike Dorning, *Americans Stick with Obamacare as Opposition Burns Bright*, BLOOMBERG BUS. (Mar. 12, 2014, 8:00 PM), http://www.bloomberg.com/news/2014-03-12/americans-stick-with-obamacare-as-opposition-burns-bright.html (discussing Bloomberg

Now, one could distinguish Social Security, Medicare, and the ACA from the interventions that this Article defends on the ground that the political effects in those laws were designed to create a political economy that would sustain them rather than one that would lead to new laws in the future. But it is not clear why that distinction should matter. Both involve influencing how future legislators will act by changing political incentives. There is no obvious normative asymmetry between repealing an existing program and initiating a new one.

Again, these appeals to existing legislation do not necessarily offer a normative reason to accept that considering political effects can be a part of deciding on what is "good policy." But, if one shares the intuition that the political strategies behind Social Security, Medicare, and the ACA were a legitimate part of what made them "good policy" decisions, the strategies defended here should benefit from that intuition as well.

The entitlement program examples also defeat the second version of the democratic legitimacy objection—the version that says that legislators can support legislation based in part on its political effects, but not if doing so involves appealing to financial incentives. Undoubtedly, many voters support Social Security, Medicare, and the ACA because they believe those laws benefit the public interest. But they also directly benefit the financial interest of the majority. At a minimum, that is the motivation to which the architects of these programs intended to appeal.[228] They would have been happy to create broad ideological support for the programs, but they knew they could at least appeal to voters' pocketbooks.

The third version of the democratic legitimacy objection avoids this response. One could believe that influencing future political decisionmaking by appealing to the financial interests of the majority is legitimate, but not by appealing to the financial interests of a powerful minority. Yet the mere fact that a minority stands to benefit from a law rather than a majority is generally not considered objectionable. It is plausible that the intensity of a voter's preference should matter just as much as the quantity of voters who share that preference matters.[229] It

poll finding that while only 13 percent of Americans favored retaining the Affordable Care Act (ACA) unchanged and 51 percent favored retaining the ACA with modifications, 65 percent of Americans (and 62 percent of Republicans) favor keeping the ban on denials based on pre-existing conditions, and 73 percent of Americans favor keeping the requirement that insurance companies allow children up to age twenty-six to stay on their parents' insurance plans).

228. *See* Jacobs, *supra* note 226, at 621.

229. *See* Elhauge, *supra* note 12, at 64–65 (arguing that a group's revealed intensity of preference is just as plausible for evaluating the outcomes of the political process as other normative baselines).

might be desirable, for example, that affirmative action policies confer benefits on minorities, even if those benefits come at the expense of the milder preferences of a larger group.[230]

Appealing to the financial interests of a minority should not be any different from appealing to other interests they have. Powerful minorities need not be affluent ones. Consider again the example of unions. Empirical research indicates that, "among the interest groups operating in the United States today, the strongest positive associations between the groups' policy positions and the preferences of the less well-off are found in labor unions."[231] Unions have organizational advantages—close interpersonal relationships, shared experiences, and a common identity among others—that compensate for their members' limited resources.[232]

As discussed above, one argument for empowering unions is that they will have a long-run incentive to support legislation and regulation that will protect worker interests. Most unions, of course, were and are not simply ideological groups. They aim to, and have a financial incentive to, protect the financial and other interests of their members. Thus, this widely accepted argument about supporting unions is essentially an argument that legislators should consider (1) the political effects of legislation that would appeal to the (2) financial incentives of a (3) minority interest.

This argument about why unions should be supported is not totally uncontroversial, and empowering unions is likely not a viable strategy today. Private sector unionism has dramatically declined in the past several decades—"From a peak of thirty-five percent in the mid-1950s, unions now represent less than seven percent of private sector workers."[233] But if it was legitimate to empower or alter the incentives of unions so that they would protect the interests of workers, it should be legitimate today to empower or alter the incentives of other interest groups to achieve regulatory goals.

CONCLUSION

Capture is usually, as it is generally understood to be, a vice; however, that the typical case of rent-seeking is unjustified entails nothing about whether all cases of rent-seeking are unjustified. In fact, the more one believes that existing legislation and regulation is the product of unjustified rent-seeking, the more likely it is that there exist opportunities for justified

230. *See id.* at 50–51 (suggesting this example).
231. Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 168 (2013) (quotations and brackets omitted).
232. *See id.* at 171–76.
233. *Id.* at 154.

rent-seeking to counteract it.

The public choice critique of legislation and regulation demands that scholars take seriously the role of politics in law. But its positive claims do not necessarily prescribe any particular normative strategy. The insights of public choice theory, refined by the objections of its critics, may provide the basis for a political strategy that many public choice theorists would reject. There is—or should be—nothing wrong with that: arguments are not fiduciaries to their creators.

The question of whether a virtuous capture strategy will be justified is contingent—both on whether the ultimate regulation at which the strategy aims is normatively desirable and whether the strategy is likely to succeed. This Article has aimed to show that, at least in some cases, the answer to both questions is yes.

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